

ENTERED

F 2302

# San Francisco Law Library

436 CITY HALL

No. 162080

---

## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov





N. 3022

No. 15400

---

**United States  
Court of Appeals**  
for the Ninth Circuit

---

ROBERT EMMETT HOYT,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Appellee.

---

**Transcript of Record**

---

Appeal from the United States District Court for the  
District of Oregon

FILED

FEB 27 1957

PAUL P. O'BRIEN, Clerk





No. 15400

---

United States  
Court of Appeals  
for the Ninth Circuit

---

ROBERT EMMETT HOYT,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
District of Oregon



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer, Amended .....	9
Attorneys, Names and Adresses of .....	1
Clerk's Certificate .....	135
Complaint .....	3
Ex. A—Schedule of Hours, etc. ....	6
Findings of Fact and Conclusions of Law ...	19
Judgment .....	23
Notice of Appeal .....	24
Pre-Trial Order .....	11
Statement of Points on Appeal .....	137
Transcript of Proceedings .....	25
Witnesses, Defendant's:	
Bogardus, Wesley L.	
—direct .....	87
—cross .....	91
—redirect .....	92
Brown, Charles F.	
—direct .....	128
—cross .....	129

INDEX	PAGE
Witnesses, Defendant's (Continued):	
DeVoe, Rachael A.	
—direct .....	93
—cross .....	104
House, J. G.	
—direct .....	84
—cross .....	86
McIntyre, Sterling	
—direct .....	107
—cross .....	115
—redirect .....	119
—recross .....	120
Witness, Plaintiff's:	
Hoyt, Robert E.	
—direct .....	27, 130
—cross .....	37, 76, 133
—redirect .....	81

## NAMES AND ADDRESSES OF ATTORNEYS

ANDERSON, FRANKLIN & O'BRIEN;

BEN ANDERSON,

333 American Bank Building,

Portland 5, Oregon,

For Appellant.

MAUTZ, SOUTHER, SPAULDING, DENECKE  
& KINSEY;

WAYNE WILLIAMSON,

1001 Board of Trade Building,

Portland 4, Oregon,

For Appellee.





In the District Court of the United States  
for the District of Oregon

Civil No. 8496

ROBERT EMMETT HOYT,

Plaintiff,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Defendant.

### COMPLAINT

Plaintiff for his cause of action against defendant alleges:

#### I.

Plaintiff brings this action under and by virtue of an act of Congress of the United States for the regulation of commerce among the states, namely, the Fair Labor Standards Act of 1938 (29 U.S.C.A., paragraphs 201 to 219, inclusive), as hereinafter more fully appears.

#### II.

That at all times mentioned herein General Insurance Company of America was and now is a corporation, incorporated and existing by virtue of the laws of the State of Washington, with its principal Oregon office and place of business located in the City of Portland and District of Oregon; that at all times mentioned herein defendant was and now is engaged in the general insurance business and is authorized to do business in the States of Oregon,

Washington and other states, and was and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

### III.

That from the 1st day of March, 1954, to the 15th day of May, 1955, plaintiff was employed in interstate commerce by defendant; that in the course of said employment plaintiff was engaged as a boiler and machinery inspector; that plaintiff's period of employment was from March 1, 1954, to May 15, 1955, at the hourly rate of pay of \$2.27; that under the said Fair Labor Standards Act of 1938 the maximum hours for straight time for that period was 40 hours per week (for purposes of computation only).

### IV.

That during the time mentioned herein plaintiff worked for the defendant certain hours in excess of hours fixed by the Fair Labor Standards Act, and that he was never paid for hours in excess of 40 hours per week, either at the overtime rate of time and one half or otherwise, to which he was and is entitled under said Act.

### V.

That at all times mentioned herein plaintiff worked for defendant various hours in excess of 40 hours per week for the period from March 1, 1954, to May 15, 1955, was paid straight time only for 40 hours per week. No overtime was paid to him for the hours in excess of 40 hours per week as shown in the attached schedule of time, marked "Exhibit

A''; that although plaintiff has made repeated demands upon defendant for payment of said \$2,295.88 as shown in the attached schedule marked "Exhibit A," defendant has refused and still refuses to pay the same, and that the same is due and owing from defendant to plaintiff; that said schedule is attached hereto and by this reference is made a part hereof.

## VI.

That plaintiff is entitled to recover from defendant a further sum of \$2,295.88 as liquidated damages.

## VII.

That it has been necessary for plaintiff to employ counsel to prosecute this claim for wages and liquidated damages and plaintiff is therefore additionally entitled to receive from defendant a reasonable amount as attorney fee herein; that a reasonable amount to be allowed as plaintiff's attorney fee herein is the sum of \$750.00.

Wherefore, plaintiff demands judgment against defendant in the sum of \$2,295.88 as the amount of unpaid overtime compensation, and an additional sum of \$2,295.88 as liquidated damages, and for the further sum of \$750.00 as a reasonable attorney fee herein and for his costs and disbursements incurred herein.

ANDERSON & FRANKLIN,

By /s/ BEN ANDERSON,

Attorneys for Plaintiff.

## EXHIBIT A

Period	Max. Hrs.	Hrs. Worked Per Week	Overtime Hrs. Per. Wk.	Reg. Rate Per Hour	Overtime 1½ Times Reg. Rate	Total Overtime for Said Period
3/1-7/54	40	50¾	10¾	\$2.27	\$3.40½	\$ 36.60
3/15-21/54	40	47½	7½	"	"	25.54
3/22-28/54	40	45¾	5¾	"	"	19.58
3/29/54 to 4/4/54	40	45¾	5¾	"	"	19.58
4/5-11/54	40	46¼	6¼	"	"	21.28
4/12-18/54	40	48¼	8¼	"	"	28.09
4/19-25/54	40	55¾	15¾	"	"	53.63
4/26-54 to 5/2/54	40	65¼	25¼	"	"	85.98
5/10-16/54	40	53¾	13¾	"	"	46.82
5/24-30/54	40	54¾	14¾	"	"	50.22
5/31/54 to 6/6/54	40	46	6	"	"	20.43
6/7-13/54	40	54½	14½	"	"	49.37
6/14-20/54	40	58	18	"	"	61.29
6/21-27/54	40	62	22	"	"	74.91
6/28/54 to 7/4/54	40	58	18	"	"	61.29
7/5/54-11/54	40	54	14	"	"	47.67
7/19-25/54	40	63	23½	"	"	80.02
7/26/54 to 8/1/54	40	41	1	"	"	3.40½
8/2/54	40	62	22	"	"	74.91
8/9-15/54	40	57	17	"	"	57.89

8/16-22/54 .....	40	51	11	"	"	37.46
8/23-29/54 .....	40	45	5	"	"	17.03
8/30/54 to 9/5/54 .....	40	62	22	"	"	74.91
9/6-12/54 .....	40	42	2	"	"	6.81
9/13-19/54 .....	40	48	8	"	"	27.24
10/4-10/54 .....	40	71	31	"	"	105.56
10/11-17/54 .....	40	50	10	"	"	34.05
10/18-24/54 .....	40	54	14=	"	"	47.67
10/25-31/54 .....	40	43	3	"	"	10.22
11/1-7/54 .....	40	48	8	"	"	27.24
11/8-14/54 .....	40	48	8	"	"	27.24
11/15-21/54 .....	40	48	8	"	"	27.24
11/22-28/54 .....	40	49	9	"	"	30.65
11/29/54 to 12/5/54 .....	40	47	7	"	"	23.84
12/6-12/54 .....	40	55	15	"	"	51.06
12/13-19/54 .....	40	57	17	"	"	57.89
12/20-26/54 .....	40	41	1	"	"	3.40½
12/27/54 to 1/2/55 .....	40	52	12	"	"	40.86
1/3-9/55 .....	40	48	8	"	"	27.24
1/10-16/55 .....	40	50	10	"	"	34.05

(Continued on Next Page)

## EXHIBIT A—(Continued) :

Period	Max. Hrs.	Hrs. Worked Per Week	Overtime Hrs. Per. Wk.	Reg. Rate Per Hour	Overtime 1½ Times Reg. Rate	Total Overtime for Said Period
1/17-23/55 .....	40	48	8	"	"	27.24
1/24-30/55 .....	40	59	19	"	"	64.70
1/31/55 to 2/6/55 .....	40	45	5	"	"	17.03
2/7-13/55 .....	40	50	10	"	"	34.05
2/14-20/55 .....	40	64	24	"	"	81.72
2/21-27/55 .....	40	49	9	"	"	30.65
2/28/55 to 3/6/55 .....	40	53	13	"	"	44.27
3/7-13/55 .....	40	41	1	"	"	3.40½
3/21-27/55 .....	40	44	4	"	"	13.62
3/28/55 to 4/3/55 .....	40	47	7	"	"	23.84
4/4-10/55 .....	40	62	22	"	"	74.91
4/11-17/55 .....	40	63	23	"	"	78.32
4/18-24/55 .....	40	51½	11½	"	"	39.16
4/25/55 to 5/1/55 .....	40	60	20	"	"	68.10
5/2-8/55 .....	40	48½	8½	"	"	28.94
5/9-15/55 .....	40	50½	10½	"	"	35.75
						<hr/>
						\$2,295.88



United States District Court,  
District of Oregon

No. Civil 8496

ROBERT EMMETT HOYT,

Plaintiff,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Defendant.

October 2, 1956.

Before: Honorable Claude McColloch,  
Chief Judge.

Appearances:

BEN ANDERSON,  
Of Attorneys for Plaintiff.

WAYNE A. WILLIAMSON,  
Of Attorneys for Defendant.

### TRANSCRIPT OF PROCEEDINGS

Mr. Williamson: If the Court please, I would like to introduce Mr. Bruce Maines, if I may. He is a lawyer from Seattle and admitted to practice there in the Federal Courts. I would like to have him assist us in this case.

The Court: Motion allowed.

Mr. Anderson: If the Court please, this is a wage and hour case.

The Court: I have read the file.

Mr. Anderson: Yes. I believe that the pretrial order is before your Honor. I have had marked Pretrial Exhibits 1 to 9, which comprise the time records and directives which have been issued by the employer to the plaintiff. I will offer them in evidence.

The Court: They are admitted.

(The documents referred to, having been identified in the pretrial order, were received in evidence as Plaintiff's Exhibits 1 to 9, inclusive.)

Mr. Williamson: Do you wish to hear an opening statement?

The Court: Suit yourself. I have read the file.

Mr. Williamson: I might make just a very brief outline of it, your Honor, if you think it would be of assistance.

The Court: You are the best judge of that at this stage.

Mr. Williamson: I would like to make just a few brief comments. Would you care to say anything, Mr. Anderson?

The Court: He can answer you.

(Brief opening statements were made by counsel for the respective parties, and thereafter the following occurred.) [2\*]

---

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ROBERT E. HOYT

the Plaintiff herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anderson:

Q. State your name to the Court, please.

A. Robert E. Hoyt.

Q. Where do you live, Mr. Hoyt?

A. Portland.

Q. What is your occupation?

A. Boiler inspector.

Q. How long have you been engaged in the inspection of boilers?

A. Approximately ten years.

Q. Where are you employed?

A. State of Oregon.

Q. How long have you been so employed?

A. About six months.

Q. Were you for a period of time employed by the General Insurance Company of America?

A. Yes.

Q. When did you first take employment with this company?      A. In 1950.

Q. Were you assigned to a territory at that time?      A. Yes. [3]

Q. What generally is the setup of the company in the State of Oregon with relation to the maintenance of an office or supervisory personnel in this state?

(Testimony of Robert E. Hoyt.)

A. Well, each inspector is assigned a territory with a chief inspector in charge.

Q. Where is the residence of the chief inspector?

A. The chief inspector was in Seattle. They had an Oregon supervisor in the Portland office.

Q. Were you employed under the direction of the supervisor in Portland? A. Yes.

Q. What were the duties of that supervisor?

A. To assist us in our work and to help us on any problems that might arise.

Q. What were your particular duties in this employment?

A. To inspect the boilers and machinery.

Q. Did that require considerable time?

A. Yes.

Q. Were you assigned a number of units to inspect, a number of companies to inspect?

A. Yes.

Q. How many did you have assigned to you?

A. Well, it varied. I had all the way from twelve hundred to eighteen or nineteen hundred at one time.

Q. Located where? [4]

A. All over Oregon and Southwest Washington.

Q. That called for travel on your part?

A. Yes.

Q. What was your means of travel?

A. Automobile.

Q. Who furnished the automobile?

A. The insurance company.

Q. Did they provide you with gasoline and oil?

(Testimony of Robert E. Hoyt.)

A. Yes.

Q. And car expense? A. Yes.

Q. What was your wage contract with the company?

A. I had no wage contract. My salary when I started was \$325 a month, and at the finish I was getting \$400.

Q. I see. What were your wages as of March 1st, 1954? A. \$400 a month.

Q. Did that continue until you terminated your employment with this company? A. Yes.

Q. When did you terminate your employment?

A. May 20th, 1950.

Q. Now as an inspector did you have regular hours or irregular hours?

A. Irregular hours.

Q. Who arranged your inspection schedule? [5]

A. Well, our regular schedule was—we more or less arranged that ourselves, with the exception of emergencies and accidents we were on call. They had our home telephone number in the various plants. They would call us nights and Sundays or any time.

Q. What was the nature of the objects that you inspected? A. Boilers and electrical motors.

Q. Did you inspect them from the standpoint of safety or efficiency or what?

A. Well, from the standpoint of safety.

Q. You would make daily reports, would you?

A. Yes.

Q. To whom would those reports be made?

(Testimony of Robert E. Hoyt.)

A. To the insurance company.

Q. Was it part of your duties to determine the suitability of the objects that you inspected for the purpose for which they were used?

A. Not for the purpose for which they were used, no.

Q. The matter of safety was your concern?

A. Yes.

Q. In making your reports did you make those reports to the branch office here in Portland or to Seattle?

A. Both. There were certain reports that went to the branch office and certain ones to the home office.

Q. Were your reports made upon forms furnished by the [6] company? A. Yes.

Q. Approximately how much of your time was spent in actual inspections and how much of your time on the average, if you know, would be spent in travel time?

A. Oh, I imagine about 75 or 80 per cent inspections.

Q. Do you imagine that or is that your best judgment? A. That is my judgment.

Q. You did on occasions, I assume, find defective or unsafe conditions in your inspections?

A. Yes, that is right.

Q. And what was your procedure on such occasions?

A. If it was very serious, we were supposed to immediately telephone the home office.



(Testimony of Robert E. Hoyt.)

Q. What were your instructions from your company with relation to making condemnations on the spot or suspending operations of any unsafe objects? A. We had strict rulings not to do that.

Q. You had strict orders from where?

A. From Seattle, the home office.

Q. Of your company? A. Yes.

Q. In what manner did you receive those orders from your company in regard to restraining you from making any on-the-spot suspensions? [7]

A. In a letter, written instructions.

Q. What is your background of experience which qualifies you as a boiler inspector?

A. As a marine engineer for about twenty years.

Q. You don't have a professional degree in engineering? A. No, I don't.

Q. What other, if any, training do you have as an inspector?

A. Well, I served an apprenticeship as a machinist and worked in various stationary plants.

Q. You have not attended any technical day school or night school? A. No.

Q. For your training? A. No.

Q. How many inspectors does this company employ in this area? A. In this area?

Q. Yes. I am talking now about the Seattle district office. A. Why, I suppose about ten.

Q. Do you know most of them? A. Yes.

Q. And the training which they received for qualification as an inspector, was that in substance the same as yours? A. Yes.

(Testimony of Robert E. Hoyt.)

Q. Were you given any training course at the time that you [8] took employment with this company for this service?

A. For about two weeks, I think, I went around with another inspector. It wasn't exactly a training course, no. I already had a license for the job.

Q. You have a State license as a boiler inspector?

A. A national license.

Q. Now will you state what the mechanics are of inspecting a boiler? What do you do?

A. Well, the boiler has to be dry, empty, and opened up thoroughly.

Q. Yes.

A. And you check the safety appliances; that is, the safety valves, the water glasses, the piping, and then if it has been inspected before you need not check the construction of it at all, providing there has not been any serious repairs to it. Then your main concern is for corrosion or deterioration.

Q. Does this inspection require you to crawl inside of the furnace?

A. Yes.

Q. Does it require you to crawl inside of the boiler shelves on occasions?

A. Yes.

Q. What kind of clothes are you wearing during your work?

A. Coveralls, boiler suits. [9]

Q. What kind of tools do you employ?

A. Oh, a hammer and a flashlight.

Q. Do you make hydrostatic tests?

A. Yes.

Q. What sort of tools do you use for that operation?

A. A gauge.

VI.

Is the plaintiff entitled to the sum of Two Thousand Two Hundred Ninety-five and 88/100 Dollars (\$2,295.88) as liquidated damages or any lesser amount?

VII.

Is the plaintiff entitled to attorney's fees in the sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars or in any lesser amount?

Exhibits

Certain exhibits have been identified and received as pretrial exhibits, the parties agreeing with the approval of the Court that no further identification of the exhibits is necessary, but that said exhibits are subject to objection on all other grounds.

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

- 16.
- 17.
- 18.
- 19.
- 20.
- 21.
- 22.
- 23.
- 24.
- 25.
- 26.
- 27.
- 28.
- 29.
- 30.

The parties hereto agree to the foregoing pretrial order and the Court being fully advised in the premises:

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties or to prevent manifest injustice; and

It Is Further Ordered that the pretrial order supersedes all pleadings; and

It Is Further Ordered that upon the trial of this case no proof shall be required as to matters of fact hereinabove specifically found to be admitted but that proof upon the issues of facts and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this .... day of  
....., 1956.

/s/ CLAUDE McCOLLOCH,  
Judge.

Approved:

/s/ BEN ANDERSON,  
Of Attorneys for Plaintiff;

/s/ WAYNE A. WILLIAMSON,  
Of Attorneys for Defendant.

Lodged October 1, 1956.

[Endorsed]: Filed October 2, 1956.

---

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on the 2nd day of October, 1956. The plaintiff appeared in person and by Ben Anderson, of his attorneys, and the defendant appeared by Wayne A. Williamson and Bruce Maines, of its attorneys. The pretrial order approved by the parties through their respective attorneys of record having been signed and entered, the case was heard without a jury by the Honorable Claude McCulloch, Judge of the above-entitled court. Evidence of the plaintiff and the defendant was heard and received and both parties rested. Oral arguments were made and briefs were submitted on behalf of the respective

parties. Thereafter the court rendered its decision and in accordance therewith the court hereby makes and enters the following:

### Findings of Fact

#### I.

That at all times mentioned herein General Insurance Company of America was and now is a corporation, incorporated and existing by virtue of the laws of the State of Washington, with its principal Oregon office and place of business located in the City of Portland and District of Oregon; that at all times mentioned herein defendant was and now is engaged in the general insurance business and is authorized to do business in the States of Oregon, Wasington and other states, and was and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

#### II.

That from the 1st day of March, 1954, to the 15th day of May, 1955, plaintiff was employed by the defendant; that in the course of said employment plaintiff was engaged as a boiler and machinery inspector, making inspections in the State of Oregon and in the State of Washington.

#### III.

That at the time plaintiff was employed by defendant, plaintiff's primary duty consisted of the performance of office or nonmanual field work directly related to management policies or general business

operation of the defendant or defendant's customers.

#### IV.

That plaintiff customarily and regularly exercised discretion and independent judgment in the performance of his duties.

#### V.

Plaintiff performed under only general supervision work along specialized and technical lines requiring special training, experience and knowledge and executed special assignments and tasks under only general supervision.

#### VI.

Plaintiff did not devote more than 20 per cent of his hours worked in the workweek to activities which were not directly and closely related to the performance of the work just described above.

#### VII.

Plaintiff's work required the consistent exercise of discretion and judgment in its performance.

#### VIII.

Plaintiff's work was predominantly intellectual and varied in character and of a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

#### IX.

Plaintiff did not devote more than 20 per cent of his hours worked to activities which are not an

essential part of and necessarily incident to the work immediately described above.

### X.

Plaintiff was compensated on a salary or fee basis at a rate in excess of \$75.00 per week.

Based upon the foregoing findings of fact, the Court hereby makes and enters the following:

### Conclusions of Law

#### I.

That at the time plaintiff was employed by defendant, plaintiff was an administrative employee within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Secs. 201-219.

#### II.

That plaintiff, at the time he was employed by defendant, was a professional employee within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Secs. 201-219.

#### III.

That the plaintiff, at the time of his employment with defendant, was in an exempt employment and not subject to the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Secs. 201-219.

Dated this 7th day of November, 1956.

/s/ CLAUDE McCOLLOCH,  
Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 7, 1956.



In the District Court of the United States  
for the District of Oregon

Civil No. 8496

ROBERT EMMETT HOYT,

Plaintiff,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Defendant.

### JUDGMENT

The above-entitled action came on regularly for trial on the 2nd day of October, 1956, before the Honorable Claude McColloch, Judge of the above-entitled Court. The plaintiff appeared in person and by Ben Anderson, of his attorneys, and the defendant appeared by Wayne A. Williamson and Bruce Maines, of its attorneys.

Testimony was introduced by both parties and both parties rested. Thereafter oral arguments were made by respective counsel and briefs were submitted to the Court. The Court thereafter rendered its decision and after due consideration made findings of fact and conclusions of law.

Based Upon said findings of fact and conclusions of law made and entered in the above-entitled action,

It Is Ordered and Adjudged pursuant to said findings of fact and conclusions of law that plaintiff have and recover nothing of or from the defendant.

Dated this 7th day of November, 1956.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed November 7, 1956.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Robert Emmett Hoyt, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that final judgment in favor of the defendant and against the plaintiff entered in this action on the 7th day of November, 1956.

Dated this 29th day of November, 1956.

ANDERSON, FRANKLIN &  
O'BRIEN;

By /s/ BEN ANDERSON,  
Of Attorneys for Appellant.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant and for an amended answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits that it is a corporation incorporated under the laws of the State of Washington with its principal Oregon office and place of business in the City of Portland, and admits that it is engaged in a general insurance business and authorized to do business in the State of Oregon, and admits that plaintiff was employed by the defendant from the 1st day of March, 1954, to the 15th day of May, 1955, and in connection with his work did boiler and machinery inspecting, but the defendant denies each and every other allegation therein contained and the whole thereof.

Defendant for a First Further Defense Alleges:

I.

That at the time plaintiff was employed by defendant, as set forth in plaintiff's complaint, plaintiff was an administrative employee within the meaning of the Fair Labor Standards Act of 1938 in that plaintiff performed office and nonmanual field work that related to management policies or general business operations of defendant or its customers; regularly and directly assisted proprietors, executives and administrative employees, or, worked

only under general supervision along the specialized and technical lines of engineering and the like that had required special training, experience and knowledge, or, executed special assignments and tasks only under general supervision; customarily and regularly exercised discretion and independent judgment; did not engage in "nonexempt work" during more than 20 per cent of his weekly hours worked; and received a salary in excess of \$75.00 or more a week.

For a Second Further Defense Defendant Alleges:

I.

That plaintiff at the time he was employed by defendant, as set forth in plaintiff's complaint, was a professional employee within the meaning of the Fair Labor Standards Act of 1938 in that plaintiff performed work predominantly intellectual and varied, to wit, engineering and the like which cannot be standardized in point of time; consistently exercised discretion and judgment; did not work in excess of 20 per cent of his time in non-exempt work and received a salary of \$75.00 or more per week.

For a Third Further Defense Defendant Alleges:

I.

That plaintiff was not requested nor required to work in excess of forty hours per week but on the contrary was instructed not to work in excess of forty hours per week and, therefore, plaintiff vio-

lated his instructions if in fact he worked more than forty hours per week.

II.

That plaintiff on numerous times and occasions, contrary to the instructions of the defendant and during the time he was employed by the defendant as set forth in plaintiff's complaint, returned to his home in Portland, Oregon, instead of staying all night in the locale where his work was to be conducted thereby increasing the number of hours of work claimed by plaintiff over and above an adequate and proper number of hours as directed by defendant.

Wherefore, defendant prays judgment herein.

MAUTZ, SOUTHER, SPAULD-  
ING, DENECKE & KINSEY,

By /s/ WAYNE A. WILLIAMSON,  
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed May 28, 1956.

---

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled case came on regularly for pre-trial conference before the undersigned judge of the above-entitled court on the . . . day of October, 1956. Plaintiff appeared by Ben Anderson, of his attorneys, and the defendant appeared by Wayne A.

Williamson, of its attorneys, and the parties, with the approval of the Court, agreed upon the following:

### Nature of Proceedings

Plaintiff brings this action under the Fair Labor Standards Act of 1938 (29 U.S.C.A. Paragraphs 201 to 219, inc.) to recover for alleged overtime while employed by defendant.

### Admitted Facts

#### I.

That at all times mentioned herein General Insurance Company of America was and now is a corporation, incorporated and existing by virtue of the laws of the State of Washington, with its principal Oregon office and place of business located in the city of Portland and District of Oregon; that at all times mentioned herein defendant was and now is engaged in the general insurance business and is authorized to do business in the States of Oregon, Washington and other states, and was and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

#### II.

That from the 1st day of March, 1954, to the 15th day of May, 1955, plaintiff was employed by the defendant; that in the course of said employment, plaintiff was engaged as a boiler and machinery inspector, making inspections in the State of Oregon and in the State of Washington.

Contentions of the Parties

I.

Plaintiff's Contentions

A.

That plaintiff's period of employment was from March 1, 1954, to May 15th, 1955, at the hourly rate of pay of \$2.27; that under the said Fair Labor Standards Act of 1938 the maximum hours for straight time for that period was 40 hours per week, for purposes of computation only.

B.

That during the time mentioned herein plaintiff worked for the defendant certain hours in excess of hours fixed by the Fair Labor Standards Act, and that he was never paid for hours in excess of 40 hours per week, either at the overtime rate of time and one-half or otherwise, to which he was and is entitled under said Act.

C.

That at all times mentioned herein plaintiff worked for defendant various hours in excess of 40 hours per week for the period from March 1, 1954, to May 15, 1955, was paid straight time only for 40 hours per week. No overtime was paid to him for the hours in excess of 40 hours per week as shown in the attached schedule of time, marked "Exhibit A"; that although plaintiff has made repeated demands upon defendant for payment of said \$2,295.88 as shown in the attached schedule marked "Exhibit A," defendant has refused and still re-

fuses to pay the same, and that the same is due and owing from defendant to plaintiff; that said schedule is attached hereto and by this reference is made a part hereof.

D.

That plaintiff is entitled to recover from defendant a further sum of \$2,295.88 as liquidated damages.

E.

That it has been necessary for plaintiff to employ counsel to prosecute this claim for wages and liquidated damages and plaintiff is therefore additionally entitled to receive from defendant a reasonable amount as attorney fee herein; that a reasonable amount to be allowed as plaintiff's attorney fee herein is the sum of \$750.00.

Defendant denies the foregoing contentions of the plaintiff.

Defendant's Contentions

A.

That at the time plaintiff was employed by defendant, as set forth in plaintiff's complaint, plaintiff was an administrative employee within the meaning of the Fair Labor Standards Act of 1938 in that plaintiff performed office or nonmanual field work relating to management policies or general business operations of employer or employer's customers; regularly and directly assisted proprietors, executives and administrative employees or worked only under general supervision along specialized



and technical lines that had required special training, experience and knowledge, or executed only under general supervision special assignments and tasks; customarily and regularly exercised discretion and independent judgment; did not engage in "non-exempt work" during more than 20 per cent of his weekly hours worked and received a salary in excess of \$75.00 or more per week.

B.

That plaintiff at the time he was employed by defendant, as set forth in plaintiff's complaint, was a professional employee within the meaning of the Fair Labor Standards Act of 1938 in that plaintiff performed work predominantly intellectual and varied which cannot be standardized in point of time; consistently exercised discretion and judgment; did not work in excess of 20 per cent of his time in nonexempt work and received a salary of \$75.00 or more per week.

C.

That plaintiff was not requested nor required to work in excess of forty hours per week but on the contrary was instructed not to work in excess of forty hours per week and, therefore, plaintiff violated his instructions if, in fact, he worked more than forty hours per week.

D.

That plaintiff on numerous times and occasions, contrary to the instructions of the defendant, during the time he was employed by the defendant, as set forth in plaintiff's complaint, returned to his home

in Portland, Oregon, instead of staying all night in the locale where his work was to be conducted thereby increasing the number of hours of work claimed by plaintiff over and above an adequate and proper number of hours as directed by defendants.

Plaintiff denies the foregoing contentions of the defendant.

### Issues to Be Determined

#### I.

At the times mentioned, was the plaintiff employed by defendant in a covered employment within the meaning of the Fair Labor Standards Act of 1938?

#### II.

At the times mentioned, was the plaintiff employed by the defendant as an administrative employee within the meaning of the Fair Labor Standards Act of 1938?

#### III.

At the times mentioned, was the plaintiff employed by the defendant as a professional employee within the meaning of the Fair Labor Standards Act of 1938?

#### IV.

At the times mentioned, was the plaintiff instructed by defendant not to work in excess of 40 hours per week?

#### V.

At the times mentioned, did the plaintiff work in excess of 40 hours per week?

(Testimony of Robert E. Hoyt.)

Q. Pressure gauges?

A. Pressure gauges and a tape measure.

Q. You use hydrostatic pumps? A. Yes.

Q. You carry those tools with you, do you?

A. Yes.

Q. Are they your own tools? A. No, no.

Q. The tools belong to your employer?

A. Yes.

Q. Did you have anything to do during your course of employment with the shaping of company policies? A. No.

Q. Did you keep time? A. Yes.

Q. Did you receive any instructions from your company how to keep your time?

A. At various times, yes.

Q. Initially, when you started your work, what instructions [10] did you have with respect to keeping your time?

A. Well, when I first started employment with the company they used those sheets you have there.

Mr. Anderson: If the Court please, may I have the Bailiff hand up this exhibit to the witness?

Q. You are being handed Plaintiff's Exhibit No. 1. Will you tell the Court what that exhibit is?

A. These are time sheets. It concerns our daily work. That is, the amount of time we spent in each company. Some days we would go in eight, nine or ten different assureds' plants. We would list the time here that we spent in those various plants.

Q. Does that include your travel time?

A. Yes, sometimes it included travel time.

(Testimony of Robert E. Hoyt.)

Q. Those are carbon copies of the originals?

A. Yes.

Q. You mailed the originals to your employer each day?

A. Well, not each day, but usually once a week.

Q. Now was there a time when you were instructed to change your method? A. Yes.

Q. One other question: The exhibit that you have in your hands, No. 1, does that include your travel time? A. Yes.

Q. What further instructions did you receive from your [11] company with relation to keeping your time?

A. Well, they had a change of chief engineers, and we were instructed to discontinue these sheets. For a while we had no way of keeping our time. We kept nothing. Then later on they came out with a different sheet. Each one of these is for a day, and the sheets they gave us were for two weeks.

Mr. Anderson: Might I have the Bailiff, your Honor, hand to the witness Exhibit No. 2?

Q. You have had handed to you Plaintiff's Exhibit No. 2. Will you tell the Court what that is?

A. This is technically the same thing, except these went for a period of two weeks and we were instructed not to put anything on these except the time we spent in the plant inspecting the object.

Q. Now during all this time did you keep a separate time record of the time that you worked for this company other than Exhibits No. 1 and No. 2?

A. Yes, I did.

(Testimony of Robert E. Hoyt.)

Q. The Bailiff is now handing you Plaintiff's Exhibit No. 3. I will ask you what they are.

A. These are expense books. We kept our various expenses in there, operating the cars, hotels, and so forth.

Q. Did you also keep your time in those books?

A. Yes, I kept my time in there with the notes on them. [12]

Q. When would you make those entries?

A. Oh, sometimes daily; sometimes at the end of the week.

Q. Is that a correct record of the time that you worked for this company during the period involved? A. Yes, it is.

Q. Did you prepare the Exhibit A attached to your complaint from the time sheets that you now have in your hands? A. Yes.

Q. Is Exhibit A attached to the complaint a correct transcript from the time sheets which have been marked Exhibit No. 3 which you have in your hands? A. Yes, it is.

Q. Were you ever paid any time for working over 40 hours a week? A. No, never.

Q. Did you at any time broach that subject to your employer? A. No, I didn't.

Q. Prior to working for this company, the General Insurance Company of America, you were employed by another insurance company, were you, as a boiler inspector? A. Yes, that is right.

Q. Did you receive overtime pay on that?

A. Yes.

(Testimony of Robert E. Hoyt.)

Q. What discussion have you had with your employer during your employment with respect to overtime pay, if any? [13]

A. Well, no discussion. At one time we kept overtime cards or time cards, and certain people got overtime, and I discontinued them on orders from the home office that I didn't come under the overtime rate and not to keep them any more.

Q. Did your employer tell you why you should not keep your overtime records?

A. No. They just stated that I didn't come in that category.

Q. I will hand you what has been marked as Plaintiff's Exhibit No. 9, and ask you whether that is a directive you received from your company?

A. Yes, it is.

Q. When did you receive that directive?

A. January 3rd, 1950.

Q. Did you receive other directives from your company in the course of this employment with regard to the detailed manner in which you should carry out your employment?

A. Yes, quite often.

Q. I will hand you Plaintiff's Exhibits 5 to 7, inclusive, and Plaintiff's Exhibit No. 9, and ask you whether those are directives relating to the detail of your work which you have received from your company during the course of your employment?

A. Yes, they are. [14]

Mr. Anderson: Your witness.

(Testimony of Robert E. Hoyt.)

Cross-Examination

By Mr. Williamson:

Q. Now, Mr. Hoyt, before you went to work for the first insurance company that you worked for as a boiler inspector—that was what company?

A. Lumbermen's Mutual.

Q. You had to obtain a State license?

A. Yes.

Q. What are the requirements before you can obtain a State license?

A. Well, as I remember, one qualification is three years' time in the operation of high-pressure steam boilers.

Q. Do you recall that if you have a degree that is reduced to two years?      A. I believe so.

Q. Is that an engineering degree?

A. I believe it is.

Q. Then do you have to be twenty-five years old before you can take the examination?

A. I am not sure. I was under the impression it was twenty-one. I am not certain. I could look it up for you.

Q. Now, if you have this experience and the age qualification then do you take a written examination? [15]      A. Yes.

Q. Where is that given? Where did you take it?

A. I took it at Portland.

Q. How long did it take to take the examination?

A. Two days.

(Testimony of Robert E. Hoyt.)

A. I didn't subscribe to that course. I studied the course, yes.

Q. You studied that for a period of about four years, did you not?

A. Something like that.

Q. Now, when you received this license that you obtained were you also then licensed as a State inspector or a Deputy Commissioner, as I believe they are called?

A. No, you are not. If you have the national license, they will give you a State license. [18]

Q. Now before going to work for the General Insurance Company were you required to have both a national license and the State of Oregon license?

A. Yes.

Q. And in connection with your work for the General Insurance Company you made inspections for the State of Oregon, too, did you not?

A. Yes.

Q. And all inspectors were required to be able to make those inspections for the State?

A. That is right.

Q. And that required that license, did it not?

A. That is right.

Q. So you had certain duties that you performed for the State of Oregon in connection with your work?

A. I believe that that is rather misleading. We performed them for the insurance company, and the insurance company submits those reports to the



(Testimony of Robert E. Hoyt.)

State. That is sort of a mutual agreement to relieve the State of that duty.

Q. It is an inspection that has to be made according to State law and the service that the insurance company provides in the form of a licensed State inspector performs the service; isn't that true?

A. That is right.

Q. In any event, as a Deputy Commissioner for the Bureau of [19] Labor, when you are licensed you have certain powers separate and apart from those granted by the insurance company, do you not?

A. I don't exactly understand you, but you have no powers——

Q. As a Deputy Commissioner?

A. That is right.

Q. Can't you, on the grounds that a boiler, for example, does not satisfy the requirements of the State code, issue an order to the owner of that boiler to shut it down?

A. No, no.

Q. You don't have any such power as a Deputy Commissioner?

A. As a matter of fact, I have written orders from the State, the chief State inspector, as an insurance inspector not to shut any boiler down without telephoning him and in conjunction with the State inspector.

Q. That would be to the State inspector separate and apart from the insurance company, would it not?

A. Yes.

Q. If you gave instructions as to how to repair

(Testimony of Robert E. Hoyt.)

a boiler, for example, and they refused to carry out your orders, what power would you have?

A. None whatsoever.

Q. You could not tell them that they couldn't continue to operate until they had repaired it in accordance with your instructions? [20]

A. You could tell them that, but it wouldn't be true, no.

Q. Now in the inspection work that you did, then, for the General Insurance Company you have mentioned that you inspected boilers and you mentioned that you inspected electrical machines. Did you also inspect other machinery? A. Yes.

Q. Did you inspect elevators, for example?

A. Yes.

Q. Did you inspect all kinds of steam engines as well as pressure vessels? A. That is right.

Q. Did you inspect all kinds of machinery—what kind of plants did you inspect, for example?

A. Oh, all kinds of plants.

Q. Sawmills? A. Sawmills; paper mills.

Q. When you would go into a sawmill would you inspect all the various kinds of machines that they had in there? A. If they were insured.

Q. If they were insured by the company?

A. Yes.

Q. You had to be able to look at the saws and the planers and everything that would be in there?

A. If they were insured, if they were covered, yes.

Q. If they were covered; that is right. And then

(Testimony of Robert E. Hoyt.)

in other [21] plants where they would have all kinds of electrical machines, why, you would inspect those of any description, would you not?

A. Yes.

Q. You would have to be able to run tests on those various kinds of machines, would you not, Mr. Hoyt?

A. That is right.

Q. Now you have mentioned that you used a hammer in connection with your work. How would you use that hammer? What would you do with it?

A. Well, that is one method of determining broken bolts, and so forth.

Q. You didn't use it to hammer anything? You would tap it and make a noise; isn't that right?

A. Yes, in that respect.

Q. You didn't use the hammer to do any repair work or anything?

A. No.

Q. It was a testing device?

A. That is right.

Q. You would tap on the boiler or whatever you were inspecting to see what kind of a sound it would emit; is that true?

A. Generally.

Q. Now, did you in your work also use, for example, a strain gauge? [22]

A. Yes.

Q. What kind of an instrument is that?

A. It is a gauge for showing the flexions of shafts and bearings.

Q. Does that require special skill to be able to use?

A. No.

Q. You mean that anyone could use that instrument?

(Testimony of Robert E. Hoyt.)

A. With five minutes' instruction they could.

Q. What does the instrument reveal?

A. It is mal-alignment, to align the bearings.

Q. On all kinds of complicated machinery?

A. No, on a large part of them.

Q. Did you ever use a tachometer?

A. Yes.

Q. What kind of an instrument is that?

A. It is a measurement for revolutions.

Q. It is a revolution counter. Does that require any special skill or instructions to use? A. No.

Q. How about the data that you would obtain from a reading of that instrument? Would that require any special skill to interpret and know what it meant?

A. Well, very little. We had instructions books with formulas to work from.

Q. Were you familiar with those instruction books? [23] A. Yes.

Q. Were they engineering in character?

A. Yes.

Q. Did you use a vibrometer? A. Yes.

Q. And a megohmmeter? A. Yes.

Q. And a volt and amp meter?

A. That is right.

Q. A thickness gauge? A. Yes.

Q. Did any of those instruments require special skill to be able to use?

A. I don't know what you are referring to as special skill, but with about five or ten minutes' instructions anyone could use them.

(Testimony of Robert E. Hoyt.)

Q. How about interpreting the data that would be obtained from them?

A. It was very simple.

Q. To be able to know from reading and the use of that data whether or not the machine was safe or unsafe or what was wrong with it and things of that sort?

A. That is right. We had a very comprehensive instruction book as to exactly what to do with it and how to interpret it.

Q. When you would take those readings would you know without [24] looking in your book whether or not there was something wrong?

A. Sometimes.

Q. Now, certain of these vessels required periodic inspections by law, did they not, as you have already mentioned?

A. Yes.

Q. What kind of vessels or machinery required such inspections?

A. Boilers and pressure vessels.

Q. How often would they have to be inspected?

A. Boilers are inspected twice a year according to law.

Q. And they are inspected for what purpose?

A. Safety.

Q. In determining whether or not a pressure vessel is safe what do you do? You check what?

A. Well, damage, natural deterioration and corrosion.

Q. The valves?

(Testimony of Robert E. Hoyt.)

A. The working of valves and appliances.

Q. Do you have to make a determination as to whether or not the corrosion has reached an unsafe state or not, or things of that sort?

A. Well, a determination, yes.

Q. If you find that a valve, for example, is worn beyond what you feel is safe, then you make a recommendation that it be changed or replaced, or something of that sort; is that [25] true?

A. If it comes under that infraction we might be required to report it.

Q. Well, first you have to determine whether it should or should not be reported, do you not?

A. Yes.

Q. If you do not report it as being defective, then it is reported as being okeh or being all right?

A. That is right.

Q. Take the State inspection, for example. If you inspect a pressure vessel of some sort and you don't find anything wrong with it, then you send in a report indicating that it is in safe operating condition; is that true?      A. Yes.

Q. Now does anyone have to come back and re-check you on that?      A. Yes.

Q. Who and how?

A. Assuming that I am working for an insurance company, the various State inspectors would check up on me.

Q. What is the purpose of you making this State inspection?

A. That I couldn't tell you, unless it is just for

(Testimony of Robert E. Hoyt.)

the saving of—the State doesn't have the men to make all of these inspections.

Q. It would be a very rare thing for a State inspector to [26] come back shortly after you had looked at a vessel and make another second inspection of it, would it not?

A. It would be rare, but it has happened several times.

Q. All right. In the general routine, though, when you make those State inspections, even though employed by an insurance company, that inspection is one that satisfies the State requirements, does it not?

A. Yes.

Q. Now if you find in your inspection that there is something that you consider defective, then do you send that in on your State report?

A. If I am sending reports to the State, yes, I would.

Q. In other words, if you were making one of these semiannual reports to the State and you found something wrong, you would then notify the State in your report, would you not?

A. That is right.

Q. And, at the same time, if you were working for an insurance company you would notify the insurance company of that condition?

A. Yes.

Q. Now, Mr. Anderson asked you how you inspected a boiler. When you go out to make one of these inspections you don't do the work of opening up the boiler or cooling it down, or anything of that sort? [27]

A. No.

(Testimony of Robert E. Hoyt.)

Q. You would notify them that you were coming on a particular day? A. Yes.

Q. Then they would have their workmen shut the machine or the boiler down and open it all up to be ready for your arrival?

A. Theoretically, yes, but as a rule during their cleaning period they would notify me that they had the boiler open.

Q. In other words, rather than make them shut down their operations, you would wait until they were going to clean it and then they would notify you and you would come out and make the inspection yourself? A. That is right.

Q. But you would not do the actual physical labor yourself of opening it up, or anything of that sort? A. No.

Q. When you went to work for the insurance company, for the General Casualty Insurance Company, as you have stated, you were given a territory; is that true? A. That is right.

Q. Would that be more or less a geographical territory? Is that what you mean? A. Yes.

Q. How many inspectors were there in Portland at that time? [28] A. Four.

Q. And how many were there in the State of Oregon?

A. I don't know. I believe there were five.

Q. There would only be one or two others than the ones that were in Portland; is that not true?

A. Yes.

Q. From the Seattle office the whole Northwest



(Testimony of Robert E. Hoyt.)

area was included, was it not?           A. Yes.

Q. Montana and Idaho—what were there, three or four states?           A. I don't know.

Q. In any event, for the State of Oregon there were approximately five inspectors?           A. Yes.

Q. When you first went to work for the General Casualty Company in Oregon, was Mr. Bogardus your immediate superior?           A. No.

Q. Who was?           A. Gene DeVoe.

Q. Who was Mr. DeVoe? What position did he hold?           A. He was the Oregon manager.

Q. Under him he had what—the whole division?

A. In Oregon?

Q. Yes. [29]           A. Yes.

Q. What all did he have under him, do you know?           A. I don't know.

Q. Would the boiler inspectors just be one small part of the people that would be immediately under him?           A. Yes.

Q. When you first went to work there was no engineer over you in Oregon, was there?

A. Yes, there was.

Q. Who?           A. W. C. Smith.

Q. Beginning with the time in question, then—that would be in March of 1954—was there anyone who was an engineer over you in Portland?

A. Yes.

Q. Who?           A. Charles Brown.

Q. Mr. Brown. What was his title in March of 1954?

A. Well, I imagine it was Oregon supervisor.

(Testimony of Robert E. Hoyt.)

Q. He didn't receive that title until later on in 1954; isn't that correct? That is, the end of 1954?

A. I can't say about that.

Q. Wasn't there a period of time, Mr. Hoyt, there for eight or nine months, or whatever it was, beginning in March of 1954, when there was no engineer in Oregon that was over [30] you engineers?

A. There was a supervisor from Seattle that was down here.

Q. That was Mr. House?

A. No, that was Frank McKeown.

Q. He was in Seattle? He was an engineer?

A. Yes.

Q. During that period of time that Seattle engineer was the only engineer directly over you; isn't that true?

A. Well, I am not sure about that.

Q. Then later on Mr. Brown was given the title of Oregon supervisor, or whatever the title was?

A. I don't know just when that was, but that was shortly after Mr. Smith left.

Q. During that time isn't it a fact, Mr. Hoyt, that the only person in Oregon who was directly over you was Mr. Bogardus? A. Yes.

Q. He wasn't an engineer, was he?

A. I don't believe so.

Q. He never went out on any inspections or knew anything about engineering?

A. I don't know what his intelligence is on engineering, but he didn't go out on inspections.

(Testimony of Robert E. Hoyt.)

Q. Did he ever consult with you to receive advice concerning engineering problems? [31]

A. No.

Q. Weren't you engineers experts in the engineering line, and wasn't he more or less in an administrative position?

A. That word "expert" is not correct. We had simply routine inspections. If there was any experting to be done, we referred it to the Seattle office.

Q. Did you ever consult with Mr. Bogardus concerning technical problems in engineering?

A. No.

Q. In any event, when you went to work, commencing in the time we are talking about, March of 1954—let's begin with that time—at that time there wasn't any engineer in Oregon that was telling you how to do your work; isn't that right?

The Court: We will take five minutes.

(Short recess.)

Q. (By Mr. Williamson): Mr. Hoyt, when you went to work for the insurance company and they gave you this geographical area, you were then given a series of yellow cards, were you not, that had the name of the insured and the equipment and so on that you were to check on them?

A. Yes.

Q. Then you would take those yellow cards and plan out the way that you were going to go through your territory and make an itinerary? [32]

(Testimony of Robert E. Hoyt.)

A. Yes.

Q. You were not always able to keep right to that schedule because a shop might call up, or an emergency, or something of that sort, and you would have to go in and call on them?

A. That is right.

Q. Or there might be other things that would arise? A. That is right.

Q. But, generally speaking, you would plan your own itinerary when you would get an assured and work that all out with the assured yourself; isn't that true? A. Yes.

Q. When you would go out on one of these visits, say the first time particularly when you had a new assured for the first time, when you would first arrive out there what was the first thing you would do? Would you go and see the management?

A. Yes.

Q. And what would you discuss with the management?

A. We wouldn't discuss anything with him. You would tell him you were there and, as a rule, let him know you were in the plant—in other words, ask his permission to go in his plant.

Q. The great percentage of the time would you be alone as far as the insurance company was concerned?

A. That depends on the size of the plant. As a rule, with [33] a large plant, it was customary for two men to go. At one time we had four men together.

(Testimony of Robert E. Hoyt.)

Q. Would you say that about 90 per cent of the time you would be alone on these inspections you would make? A. Yes.

Q. All right. So then you would go out and you would see the management. Now, on a first inspection, where you had a new assured, before you would go out and actually start inspecting the boilers or the machines you had other, more general, inspections to make, did you not, such as to see what the housekeeping of the plant was, for example?

A. No, we never bothered with that.

Q. Would you try to make an effort to size up the personnel and see how they were operating the machines and if they were doing it properly or not?

A. I did that personally, but that was not a company order.

Q. Wasn't that something that you were interested in finding out? A. Yes.

Q. Would you size up the kind of maintenance program that they had in effect at the plant?

A. That was taken care of.

Q. But would check to see what kind or means of repairing that they would have available in the event of a breakdown?

A. That was required in the policy forms. [34]

Q. Would you make recommendations as to the training of personnel that they might employ to advantage? A. No.

Q. Would you help them in their loss-prevention programs?

(Testimony of Robert E. Hoyt.)

A. What do you mean by help them?

Q. Help them set up and plan their programs for loss prevention in the training of personnel, and so forth?

A. We would give them the benefit of our experience in the form of suggestions.

Q. Yes. In other words, you might make the suggestion that they put an additional man on for some particular reason, or something of that sort?

A. No, no.

Q. You would make suggestions as to the kind of an inspection service they ought to have themselves, or things of that sort?

A. Sometimes.

Q. Did you ever assist them in training personnel?      A. No.

Q. You just made some suggestions as to what they might do to advantage?      A. Yes.

Q. Now, if you found that the plant as a whole was deficient in some of the things that I have just discussed you, their maintenance program, their means of repairing, their training [35] program, and so on, would you make reports of that to the company if you found it to be unsatisfactory?

A. Yes.

Q. When you would make a recommendation to the company or a report to the company, would that, in turn, then be communicated to the assured—that is, your recommendation?

A. That depends on what the underwriters and the chief inspectors thought of it.

(Testimony of Robert E. Hoyt.)

Q. Now, you spoke about the reports that you make. When you would first go to a plant and you did make your inspection of the machinery, you would make out an initial report form; is that true?      A. Yes.

Q. Was that on a form for the State that was provided by the insurance company?

A. The State only required internal inspections on boilers and pressure vessels. It was very seldom that you ever got an internal inspection on your first visit.

Mr. Williamson: Will you hand the witness Defendant's Exhibit 1.

Q. That Exhibit No. 1 for Identification that you are holding, Mr. Hoyt, is that the form that you used for your initial report?

A. Yes, similar to that.

Q. Now, is that a similar form to the one that was sent in [36] to the State of Oregon?

A. No.

Q. That is similar to the one that was sent to the company, however?      A. Yes.

Q. Now, when you put something down here under "Remarks" what information would you put in that blank?

A. Usually the attitude of the management and his facilities for making repairs.

Q. Things of the sort that we have just been discussing?      A. Yes.

Q. In addition to that, when you would make out

(Testimony of Robert E. Hoyt.)

these reports, say for the initial report, would you make recommendations to the company as to technical matters?

A. What sort of recommendations?

Q. Like the particular machine should be repaired in some particular way, or that it ought to be cleaned out, or things of that sort?

A. Yes.

Q. Now, if the particular machine or boiler, or whatever it was, was satisfactory, you would so indicate on your report to the company, would you not?      A. Yes.

Q. Insofar as the insurance company was concerned, when you finished with your inspection and if you had recommendation [37] to make, what would you do? How would you physically go about doing that? You would come back to the Portland office and dictate a letter to the girl, would you?

A. No, we would go write it out with pencil by ourselves.

Q. You would write it out. That would then be given to a girl to type up?

A. Is this for a company report?

Q. Yes, your own company report.

A. No, it would be mailed that way.

Q. Who would mail it?      A. I don't know.

Q. I mean would you mail it yourself?

A. No.

Q. It would be mailed from the office the way you wrote it?      A. Yes.

Q. In your own handwriting?      A. Yes.



(Testimony of Robert E. Hoyt.)

Q. A copy would come to the Portland office?

A. No.

Q. You would be the one to keep the copy for the Portland office?

A. There is quite a number of reports there. As a rule, recommendations like that, there was only one copy made and it was sent to Seattle. Now at various times or another they [38] changed that procedure.

Q. Let's take the time of March of 1954, up until the time that you left? A. Yes.

Q. Was the procedure changed during that interval of time? A. Yes.

Q. Tell us the procedure when you first started, then. Let's take this kind of an example. You went out and you made an inspection and you had certain recommendations to make in regard to the machinery that you had inspected. Then you would do what? You would make out a report?

A. I would put the report in the mail for the Seattle office.

Q. Did a copy of it go anywhere else?

A. I don't know.

Q. Was that procedure changed then?

A. Yes.

Q. How was it changed?

A. We would file our reports at Portland here, and, as I understood it, they were not mailed to Seattle.

Q. All right. Do you know when that change went into effect?

(Testimony of Robert E. Hoyt.)

A. Not exactly, but it was——

Q. In 1954 sometime? A. Yes. [39]

Q. Now, under that system you made your report and it was filed in Portland? A. Yes.

Q. Where did the copy go?

A. I imagine a copy went to the assured.

Q. All right. A copy went to the assured the way you had written it up, did it not?

A. No. Now, the wording, the English and so forth, was digested and changed accordingly.

Q. Who changed it? A. I don't know.

Q. Did you ever see any of the reports received by the assureds? A. Yes.

Q. Were they still the way you had written them up? A. No.

Q. They never were?

A. I don't ever remember of seeing one in my words, no.

Q. Would the reports when you would see them after they had reached the assured contain the same recommendations that you had made?

A. Sometimes.

Q. What was the fact, Mr. Hoyt? Can you ever remember an occasion when they were changed from the way you had recommended them? [40]

A. Yes, I can remember occasions.

Q. Can you give the Court some idea as to how frequently that occurred? Would that be on rare occasions?

A. Oh, I would say maybe—you understand, there were not many of these company reports I

(Testimony of Robert E. Hoyt.)

have seen after they were sent out, but perhaps 50 per cent of them were changed.

Q. You kept a copy of the recommendations that you had made, did you not, for a particular plant or machine? A. Yes.

Q. When you went back to the plant would you check to see that your recommendations had been complied with? A. Yes.

Q. What was the fact as to whether or not your recommendations would have been complied with?

A. What was that again?

Q. When you would go back what is the fact as to whether or not these assureds would comply with the recommendations that you had made?

A. Well, if they had not complied, it would just go in the next report. And if they had, why, that would also go in that report.

Q. As a matter of practice, did they comply with your recommendations in the great majority of cases?

A. No. I would say about 50 per cent of them.

Q. Is that true of the recommendations that you made that [41] went in to the State of Oregon, too?

A. That is a different matter.

Q. How is that different?

A. Well, that is different in this respect: There is a State law concerning those boiler recommendations, and if it is a matter of safety they are not issued an operating permit until it is corrected.

Q. So at least as to those recommendations that

(Testimony of Robert E. Hoyt.)

you would make for the benefit of the State of Oregon they would be complied with?

A. Generally; not always.

Q. When you had recommendations to make, would you oftentimes discuss those recommendations with your assured? A. Yes.

Q. And how would you have to handle that? Would you have to be diplomatic?

A. As diplomatic as possible.

Q. Would you have to be careful to try to handle them in a way that would be advantageous to the company as well as satisfactory from an inspector's standpoint?

A. Well, it had to be handled so as not to be as disagreeable as possible to the assured.

Q. You had to know your men that you were dealing with, did you not?

A. If possible. However, a recommendation was a recommendation, [42] no matter what the man was.

Q. I know, but didn't you have to know your men, and didn't you have to be careful to see that your man wanted it straightened out or not, or if he was going to humor an unsafe condition, and things of that sort?

A. No; if it was an unsafe condition, it had to be reported, regardless.

Mr. Williamson: May I have the witness' deposition handed to him, please?

Q. Would you look on Page 27, please, Mr. Hoyt. Do you recall, Mr. Hoyt, when I took your deposi-

(Testimony of Robert E. Hoyt.)

tion on May 17th, when Mr. Anderson was there and I was there?      A. Yes.

Q. In your attorney's office?      A. Yes.

Q. On page 27, about the middle of the page, do you recall my asking you these questions:

“Q. Well, how would you know whether or not a boiler was safe?

“A. Well, if it was deteriorated, eaten away, corroded, full of scale or had the safety valve plugged or something, I would consider it unsafe.

“Q. Would you sometimes talk to the assured about those conditions without phoning Seattle? [43]

“A. Oh, yes. Yes. Numerous times things like that happened that the assured knew nothing about.

“Q. You would point them out to the assured?

“A. That's right.

“Q. And ask him to straighten it out?

“A. Well, you had to be very diplomatic about that. You had to know your man. See if he wanted to straighten it out or not, or if he was going to humor an unsafe condition and jeopardize the company.

“Q. Then you would have to be more firm?

“A. Well, then that is when I would dump it in somebody else's lap and back out gracefully.”

Do you recall that?      A. Yes; that is correct.

Q. Are those correct statements, Mr. Hoyt?

A. Yes, they are.

Q. Now, you had the Weyerhaeuser plant as one of the plants that you inspected in your territory, did you not?      A. Yes.

(Testimony of Robert E. Hoyt.)

Q. Where was that located?

A. At Longview.

Q. Now, for policy reasons you made a lot of inspections up there, did you not? [44]

A. Yes.

Q. I have used the term "policy reasons," although I have taken it from you. What is meant by that, for policy reasons that you would go there frequently?

A. Well, as an example in that plant my orders was to give them service regardless of what it was, even though it wasn't covered by insurance and had nothing to do with our inspections or anything.

Q. In other words, any time they wanted your service, advice or suggestions, why, you were supposed to make that advice, service and suggestions available? A. Yes.

Q. Did you do that? A. Yes.

Q. And would you be alone frequently when you would go up to make those recommendations and so on? A. Yes.

Q. Lots of times you would stop what you were doing and go up and consult with them about matters? A. That is right.

Q. Now, there was some mention made on your direct examination about suspensions, and calling Seattle concerning suspensions, and so on. But that would be a very, very rare occasion, when there would be a suspension; isn't that true, Mr. [45] Hoyt?

(Testimony of Robert E. Hoyt.)

A. I don't know exactly how rare, but it has happened quite often.

Q. Now, by a suspension do you understand that I refer to advising the assured that by reason of their failure to comply with the recommendations that their insurance is suspended?

A. That is right. Not the entire policy, but the insurance on that particular object or machine.

Q. Now, you avoided suspensions by getting co-operation out of your assured to work these matters out, did you not?           A. Yes.

Q. On occasion would you consult with the agent who had sold the policy to the assured?

A. No.

Q. Have you ever had occasion to suspend a risk during the time that we are talking about, from March of 1954 to May of 1955?           A. No.

Q. Have any of the risks that you inspected, to your knowledge, ever been suspended during that period of time?

A. Various pieces of machinery and equipment; yes.

Q. Can you name some of them for us, please?

A. Yes. I can name you a couple of motors from a sawmill.

Q. Where was that?

A. Warm Springs Lumber Company.

Q. What occurred there? [46]

A. Well, it was just a matter of the owner refused to fix up his machinery. He decided it wasn't necessary, and the objects were taken off the policy.

(Testimony of Robert E. Hoyt.)

Q. Where was this located? At Warm Springs?

A. Yes.

Q. Who made that inspection?

A. At that time Chief Engineer Stevens.

Q. Were you there with him? A. Yes.

Q. Had you originally reported the recommendation?  
A. Yes.

Q. And the owner had refused to comply with your recommendation?  
A. Yes.

Q. So eventually it got to the point where the machines were actually suspended?  
A. Yes.

Q. Now, ordinarily you avoided that sort of a situation, did you not, or tried to, Mr. Hoyt?

A. Yes.

Q. Would you refer to Page 19 of your deposition, please, in the middle of the page, where I asked you:

“Q. Along that same line, as I understand it, why, on occasion if you found that something wasn’t quite right, why, you would go and visit [47] the agent and see that everything was smoothed over?”

“A. If we had time.

“Q. Uh-huh. You had occasion at various times to discuss matters with the agent and try to keep everything smooth?  
A. Yes.

“Q. The same thing with the assureds, to try to keep things going smooth?”

“A. Yes; that’s right.”

Do you recall my asking you those questions?

A. Yes; but that was in a different vein. That was in such a case that I felt that the assured was



(Testimony of Robert E. Hoyt.)

hostile, and may cancel his policy, then he deals directly with his agent, and it was up to the agent then to handle it.

Q. But you would on occasion consult with the agent, would you not?

A. Under those circumstances, if the assured was on the peck or hostile towards any suggestions or anything.

Q. Then you would meet and talk with the agent about it and try to get it worked out so that it could be taken care of?

A. I would set forth what the situation was; yes.

Q. When you would go to the agents, would they sometimes ask your advice concerning the matters in connection with the [48] assureds?

A. What do you mean by advice? Concerning what?

Q. Concerning the risks or concerning the quotation of rates on machines, and things of that sort.

A. Yes; they would.

Q. Did you have that information so that you could give it to them?

A. I would have to contact the underwriters on that sort of thing.

Q. Did you have a lot of that information yourself that you were personally familiar with as to rates?

A. Oh, working with the company like that, I got acquainted with them, but that was not part of my job. And they had so many various rates, depend-

(Testimony of Robert E. Hoyt.)

ing upon the policy and the agents, and one thing and another, I never attempted that.

Q. Didn't you have encouragement from Mr. Bogardus, the man in charge of the entire area, of which the engineers were one part, to push the insurance program?

A. To push the insurance program?

Q. Yes.

A. Well, yes; but not to make any quotes as to rates.

Q. Now, would you refer to Page 14 of your deposition. At the top of the page, in speaking about the instructions that Mr. Bogardus did give you, perhaps once a month or every two months, then: [49]

“Q. Would you say that he gave you on an average of once every month or two months an instruction of some sort? A. Yes.

“Q. What kind of instructions did he give you?

“A. Oh, usual pep talks to call on the agents and drum up a little business and one thing and another.

“Q. Sort of like a sales meeting to get everybody enthused? A. That is right.”

Do you recall my asking you that? A. Yes.

Q. Are those true answers? A. That is true.

Q. In other words, then, Mr. Bogardus did talk to you engineers about calling on the agents and trying to work up business for the company, and things of that sort? A. Yes.

Q. And did you do that?

A. On occasions, when we had time, we would

(Testimony of Robert E. Hoyt.)

call on the agents. But you ought to understand that that came in in the later stages of my employment there. At one time it was a policy that we should spend 25 per cent of our time in the agent's office. But I never did do that, because I [50] was continuously behind with my work all the time.

Q. I see. Now, the recommendations that we have been talking about that you would make following your inspections would sometimes concern, as I think you have said, technical matters such as getting rid of scale, improvement of valves, making repairs and things of that sort; is that correct?

A. That is correct.

Q. Also, did you ever make any recommendations, for example, that there ought to be a deductible type policy on this particular assured or on this particular piece of equipment?

A. Yes; I believe I have.

Q. What would you mean by that?

A. Well, when a plant was having too many accidents, the same as a deductible on your automobile, that he would stand the first \$100 or the first \$1,000 loss himself.

Q. In other words, to save the company money on that particular risk a deductible would be proper and advantageous?

A. Yes.

Q. Did you ever make any recommendations that the company get off the risk entirely?

A. I don't recall that I did.

Q. Would you ever make any other kind of

(Testimony of Robert E. Hoyt.)

underwriting recommendations as to a particular assured other than like a deductible?

A. Well, I don't know. I wasn't an underwriter, and I [51] wasn't very familiar with the procedures.

Q. In the event of a breakdown or, in other words, in the event of a loss, Mr. Hoyt—let's say that there was a use and occupancy coverage; in other words, that you had coverage on the plant that while it was out of production that the insurance company would reimburse for losses due to loss of income while it was out of production, assuming you had that kind of a loss what would you do on receiving advice that such a breakdown had occurred?

A. Well, our main job was to find them an additional piece of machinery; for instance, an electric motor. We had lists of various people, various plants, that had those in storage and we would inform them where they could get one as a replacement.

Q. Now, then—did I interrupt you? Go ahead.

A. No; you didn't interrupt me.

Q. Would you render assistance in getting people in there to make the repairs?

A. What sort of assistance?

Q. As to where they might go to find trained personnel that could do the work, or things of that sort?

A. No; no.

Q. Did you ever make any recommendations at all as to the people who could do some of this repair work to get the plant back into operation? [52]

(Testimony of Robert E. Hoyt.)

A. I never recommended anyone, but I told them where they could find a man that could do it, possibly. That is, different parts or supplies, and so forth.

Q. In other words, you would not make any commitments for the insurance company?

A. No.

Q. Didn't you give suggestions and recommendations to the assured to try to assist him in getting the plant back into operation?

A. As much as I could, as much as I knew without committing myself.

Q. If you didn't have that use and occupancy type of coverage, so that it was just a matter of a machine being burned out, or something of that sort, where there might be a loss that would be covered by the insurance, what would you do in those cases? Would you make an inspection?

A. Yes, we would make an inspection and write up an accident report.

Q. Would you try to determine the cause?

A. Yes.

Q. Would you try to make recommendations as to preventive measures that could be taken to prevent such a thing from happening in the future?

A. If the cause could be determined.

Q. Would you assist in that determination? [53]

A. Yes.

Q. Now, as far as making contacts with Seattle is concerned, you would frequently go for several

(Testimony of Robert E. Hoyt.)

months without ever having occasion to make any contacts with Seattle, would you not?

A. That is right.

Q. Frequently you would go maybe several weeks without even making contact with the Portland office?

A. No, as a rule we were in the Portland office at least once a week.

Q. Was it your custom to return home at the end of the day each day?

A. If I was close enough to home, yes.

Q. When you first started working for General, did you receive any instructions in that connection?

A. No.

Q. Did you receive any instructions in the planning of your work, to try and plan it so that if you were out of town you would stay in that area and get the work accomplished before returning back to Portland?

A. Our instructions on that was when we started on, for instance, a sawmill to stay there and complete the mill.

Q. Those were the instructions that you were given; isn't that true?      A. Yes. [54]

Q. Now did you ever violate those instructions?

A. No.

Q. Did you receive criticism for not following those instructions?      A. No.

Q. Was your employment with the General Casualty terminated voluntarily or involuntarily?

A. Involuntarily.

(Testimony of Robert E. Hoyt.)

Q. Wasn't one of the reasons that you were given as to the reasons for your termination the fact that you had not complied with the company's instructions about staying away from the office and getting work done in a particular area?

A. That is true. Let's go back to your other question a minute here. You said when I first started working with the company what my instructions were. Later on they had a change of engineering policy on everything, and about the last six months or so they had a complete change of policy there. Then that was when the criticism came in.

Q. That would be commencing when, Mr. Hoyt?

A. When Frank McKeown——

Q. Can you give us the approximate period of time?      A. Oh, I would say in the last year.

Q. In other words, commencing in what? The middle part of 1954?

A. I don't know exactly, but you can find out. Whenever [55] Frank McKeown had charge of the engineers up there. I would say it might have been in the middle of '54, yes.

Q. Do you think it was maybe earlier than that?

A. It wasn't very long.

Q. In other words, your employment with the General Casualty ceased in May of 1955?

A. That is right.

Q. As I understand it, you say that about a year before that time there was this change in policy concerning your instructions about going

(Testimony of Robert E. Hoyt.)

away on the road?           A. Yes.

Q. Now, were the instructions that you were given that if you went up to Longview, for example, you would stay up there until you got the Longview work finished?

A. That is correct. That is correct.

Q. Did you do that?

A. As far as possible.

Q. Or were you in the habit of returning to your home in Portland at the end of the day?

A. I had been in the habit of returning home, but when they gave me instructions to stay there I stayed there as long as the work required it.

Q. Now you said that when you first went with the company you were making out these sheets as shown in Exhibit No. 1. Is that right? [56]

A. That is right.

Q. Those included travel time?           A. Yes.

Q. Now, on the two-week sheets as shown in Exhibit No. 2, do those include travel time?

A. No.

Q. They do not?           A. No.

Q. You say that there was a change in the company policy from the time that you changed from the type in Exhibit 1 to Exhibit 2?           A. Yes.

Q. And at the time that you were making Exhibit 1 your instructions were to include travel time?           A. Yes.

Q. I will hand you what has been marked as Plaintiff's Exhibit No. 6. What is the date of that document?           A. December 29, 1950.



(Testimony of Robert E. Hoyt.)

Q. Now the bottom paragraph of that document reads how?

A. "The time recorded on inspections is to be the time spent by the inspector in the plant inspecting objects of the type in question and discussing plant problems with respect to such objects."

Q. Were those the instructions that you are referring to when you were making out Exhibit No. 1? [57] A. Yes.

Q. And yet those instructions say that you are only supposed to record time spent in the plant?

A. Those forms are so marked for travel time there.

Q. But you claim that these in Exhibit No. 2 do not include travel time? A. No.

Mr. Anderson: Just one second. Do you mean No, it does not include travel time, or what did your answer mean?

A. I mean No, we were not supposed to put travel time in on that.

Q. (By Mr. Williamson): Did you put it in?

A. Not when I thought about it. Sometimes I perhaps did.

Q. Now, here in Exhibit No. 2, for example, under date of 4-14-55 it says travel time, three hours. A. Yes.

Q. Then just above that, on 4-13, travel time, three hours. That is 4-13, to Longview, three hours; and on 4-14, to Longview, travel, three hours. On

(Testimony of Robert E. Hoyt.)

4-6-55, travel time to Longview, one hour; 4-8, travel time, two hours; 4-10, travel time, three hours; 4-11, travel time, one hour. A. Yes.

Q. Have you looked at these documents in Exhibit No. 2, Mr. Hoyt?

A. Not lately, but I am well aware of what it contains. [58] We did start making those without instructions, and then the instructions were changed later on.

Q. Now, Exhibit No. 3, which are these time records, is that supposed to fill in the gap between what is in No. 1 and No. 2?

A. Not only the gap, but that also includes those.

Q. Didn't you have other copies of the time records in Exhibit No. 2 than those that you have here? A. No.

Q. Have you produced all of the ones that were made? A. On that particular one?

Q. Yes.

A. I have produced all that I have.

Q. All that you have. But there were others that were made, were there not, Mr. Hoyt?

A. I couldn't tell you that, but I believe that is all of them.

Mr. Williamson: Would you mark those, please.

(A group of documents headed "Boiler and machinery Inspector's Record of inspections" was marked by the Clerk as Defendant's Exhibit 2 for Identification.)

(Testimony of Robert E. Hoyt.)

Q. (By Mr. Williamson): Do I understand that you were told to stop making reports on the kind that appears in Exhibit No. 1, and then there was a gap or a time interval before you [59] started on Exhibit No. 2? A. That is correct.

Q. Do you remember what that time interval was? A. No, I don't.

Q. Now, what you hold in your hand, Defendant's Exhibit No. 2 for Identification, are those these same time sheets that you had reference to; that is, in Plaintiff's Exhibit No. 2? A. Yes.

Q. Are those made out in your handwriting?

A. Yes.

Mr. Williamson: I will offer them in evidence.

Mr. Anderson: No objection.

The Court: Admitted.

(The group of records above referred to, having been previously marked for identification, was received in evidence as Defendant's Exhibit 2.)

Q. (By Mr. Williamson): Now, on what date does that top one commence? A. 7-15-54.

Q. You don't have any 7-15-54 in here, do you?

The Court: Recess until 1:30.

(Thereupon, a recess was taken until 1:30 o'clock p.m. of the same day.) [60]

## Afternoon Session

(Court reconvened at 1:30 o'clock p.m., pursuant to the noon recess, at which time proceedings herein were resumed as follows:)

## ROBERT E. HOYT

resumed the stand as a witness in his own behalf and was further examined and testified as follows:

## Cross-Examination

(Continued)

By Mr. Williamson:

Q. Mr. Hoyt, did you have a chance to look at Defendant's Exhibit 2 that you now hold in your hand to see that those were records that you had submitted to the company that covered a portion of this period that you indicated was covered by Exhibit No. 3, those pamphlets? A. Yes.

Q. Those records are ones that you made, the same as Exhibit No. 2 of plaintiff, but they just encompass a greater period of time; isn't that right?

A. That is correct.

Q. Were those records accurate records?

A. Accurate in what way?

Q. As to time?

A. Yes; they were accurate as to covering the inspections.

Q. Did those include travel time? [61]

A. No, not always. I can't recall the date, but we had orders to exclude travel time from these reports.

(Testimony of Robert E. Hoyt.)

Q. No; I mean as a matter of practice they were included in your report, were they not? In other words, if you got up in the morning and left town at 8:00 o'clock, you started keeping track of your time from 8:00 o'clock until you got back at the end of the day; isn't that right?

A. That is correct, for total time; yes.

Q. Now, when you first started with General you were told that you were not to keep overtime; is that correct?

A. That is correct.

Q. Those records that you hold in your hand and the other ones that have been indicated were not kept for purposes of compensation, were they?

A. I don't believe so.

Q. Those were records that were kept for the purpose of giving information for the establishment of rates and determining the cost of making inspections on particular risks and that sort of information, were they not?

A. I believe that is correct.

Q. But they were not in any way kept for purposes of determining your salary or your earnings or anything of that kind?

A. I don't know what happened to them nor why, but they could be used for anything that you wanted to. [62]

Q. Was it your understanding that that was the purpose that they were kept for, was compiling rates?

A. Yes.

Q. When you first went to work for General were you told that you were only expected to work

(Testimony of Robert E. Hoyt.)

a 40-hour week?           A. No.

Mr. Williamson: Would you hand the witness his deposition, please?

Q. Would you look on Page 39, please, a little above the middle of the page, where the question is:

“Q. But you didn’t ever, for the reason you have already stated, go back to General and talk to them about the matter any further?

“A. No. No. As a matter of fact, this last supervisor they had in Seattle, Mr. McKeown, said that we were only expected to work 40 hours a week, but we had to work if it was necessary, if it was Sundays, holidays and nights, but we were supposed, theoretically, to get that time back if we ever got a chance to get it back.

“Q. You mean he told you that 40 hours was the week you were supposed to put in?

“A. Yes; that’s right.”

Do you recall those questions being asked you?

A. Yes; I do. [63]

Q. Are those correct answers?

A. That is correct, but that happened after I had been working there over three years.

Q. When was Mr. McKeown there?

A. I don’t recall the dates, but he was there, I imagine, about a year.

Q. From about the middle of 1954 on, he was the chief, was he not?

A. That was my understanding.

Q. And that was what Mr. McKeown told you?

A. Yes.

Q. Now, to clear this up, Mr. Hoyt, you were

(Testimony of Robert E. Hoyt.)

told that you were supposed to work a 40-hour week, and you were supposed to plan that out as best you could?      A. That is right.

Q. And when you first went to work for the General you submitted overtime figures, and they told you not to do that any more; that you would not be receiving overtime?      A. That is right.

Q. I wanted to get this clear. Now, when you gave assistance to these assureds, that was advice and suggestions; that was not manual work that you gave them?      A. That is correct.

Q. Your salary was \$400 a month after you got your raise from \$325, or whatever it was? [64]

A. That is right.

Q. Did you receive any other salary or compensation?

A. That was the total salary. We received a bonus provided the company made money, and so forth.

Q. How much was the bonus?

A. It amounted to two weeks' pay three times a year.

Q. At \$400 a month that would give you \$200 in your bonuses?      A. Yes.

Q. So for three times a year you got \$200?

A. Yes.

Q. Although that was a bonus, did you receive that regularly during the time you were so employed?

A. During the time I was there I did.

Q. Just before coming to work for General you

(Testimony of Robert E. Hoyt.)

had worked for the Lumbermen's Mutual as a boiler inspector doing the same type of work that you did when you came to General?

A. That is right.

Q. You testified you were given overtime pay for the time you worked for Lumbermen's?

A. That is right.

Q. But you didn't make any claim for that overtime until after you quit Lumbermen's, did you?

A. Yes; prior to the time I quit they sent out overtime forms for us. [65]

Q. And you made a claim after you quit?

The Court: Mr. Williamson, that doesn't make any difference under the Wages and Hours Act. He is either entitled to it or he is not entitled to it. It doesn't make any difference whether a man claims it or not. It doesn't make any difference whether he claims it in good faith or not.

Mr. Williamson: I agree with your Honor. The only purpose of the question was to show that the man did have some understanding and knowledge of the subject.

The Court: What has that got to do with it? The law is inflexible, rigid.

Mr. Williamson: I think that is all I have, your Honor.



(Testimony of Robert E. Hoyt.)

Redirect Examination

By Mr. Anderson:

Q. Now, Mr. Hoyt, when McKeown said to you that you were only working 40 hours, did he cut down on the amount of work that you had to do?

A. No; he increased it.

Q. Was it possible to do the work you did in less than the hours which you put in for?

A. No; absolutely not.

Q. To what extent was your work increased at that time? [66]

A. At one time it was doubled.

Q. When was that?

A. That was after they discharged a couple of inspectors and before they got anyone to take their place or anything.

Q. You were definitely instructed by your employer not to report overtime to the Seattle office?

A. Yes.

Q. During that period you have kept an accurate account of your overtime, have you? A. Yes.

Q. That account is reflected in Exhibit No. 3 here? A. That is right.

Q. Now, Counsel was asking you about your directions to your insured people about making repairs. I would like to hand you Exhibit No. 4 and ask you whether or not it is not a fact that your employer gave you specific directives not to obligate the company in any way on repairs?

(Testimony of Robert E. Hoyt.)

A. Yes; that is correct.

Q. And is that the directive you have in your hands, Exhibit 4?      A. Yes.

Q. That was made in 1949, I believe, was it not?

A. Yes.

Q. Did that rule continue throughout your employment?

A. Yes; that was a standard rule. [67]

Q. On the occasions when an object under a policy would be suspended—I think you mentioned the Warm Springs Lumber Company. Do you know why the chief inspector accompanied you out there to suspend that object?

A. Yes. It was in very bad condition, and we were having a lot of losses on it. And that was the usual practice, whenever they were what we called a bad risk, with a lot of losses, and so forth, the chief inspector would usually go out and look it over to see if—to check on our report, and so forth.

Q. Are you familiar generally with the procedure in inspecting boilers and handling this type of work throughout the various states?

A. Yes.

Q. Is the method used in Oregon by your company generally of the same character as inspections made throughout other states in the United States?

A. Yes.

Q. It is sort of a uniform program, is it not?

A. Practically; yes.

Q. Now, the insurance companies recruit their

(Testimony of Robert E. Hoyt.)

inspectors, do they not, generally from operating engineers and marine engineers?

A. Yes; that is right.

Q. And generally the operating engineers are licensed [68] personnel, are they not?

A. Sometimes; yes.

Q. In the State of Washington?

A. Yes; that is right.

Q. Even firemen are licensed in Seattle, are they not?

A. Yes.

Mr. Anderson: I think, your Honor, we are prepared to rest except as to this matter of attorney's fees. I have asked Counsel for a stipulation that if the plaintiff prevails the Court may, in its discretion, fix a proper fee.

Is Counsel willing to so stipulate?

Mr. Williamson: I am, your Honor.

The Court: What kind of insurance have you been talking about?

The Witness: Casualty insurance.

The Court: Not fire?

The Witness: No; no, sir.

(Witness excused.)

Mr. Anderson: We rest, your Honor. [69]

## J. G. HOUSE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Williamson:

Q. Will you state your name, please?

A. J. G. House.

Q. Where do you live, Mr. House?

A. Bothell, Washington.

Q. By whom are you employed?

A. Simpson Paper Company.

Q. In what capacity? A. Plant engineer.

Q. How long have you been so employed?

A. About six months.

Q. Where were you last employed?

A. Prior to Simpson?

Q. Yes.

A. Marsh & McLennan.

Q. How long did you work for them?

A. Three years.

Q. Where did you work before that?

A. General Casualty Company.

Q. How long did you work for General Casualty Company?

A. Approximately eight years. [70]

Q. Terminating at what time?

A. December, 1952.

Q. At the time that you were last working for General Casualty Company what was your position?

(Testimony of J. G. House.)

A. Chief inspector or manager of the Boiler and Machinery Department.

Q. Where was your office? A. Seattle.

Q. What personnel were under your supervision?

A. All of the Boiler and Machinery Department inspectors, underwriters, and so on.

Q. How many inspectors did you have in Oregon in 1954, do you remember?

A. I would say five or six.

Q. Was Mr. Hoyt one of those? A. Yes.

Q. Now, in 1954—were you with the company in 1954? A. No.

Q. You had terminated before that time?

A. Yes.

Q. But before you quit Mr. Hoyt had been one of the inspectors in Portland under your supervision; is that right? A. That is right.

Q. Now, Mr. House, did you ever have occasion to discuss [71] with the Portland inspectors, including Mr. Hoyt, the matter of travel time and how they were to use it and plan it?

A. Very definitely. I don't know on how many occasions, but that was one of the problems that we were faced with.

Q. Would you explain to the Court what you mean by that? What instructions did you give?

A. That when they went to inspect a plant they were to stay there, barring unforeseen incidents coming up, until the inspection had been completed. In other words, the question or the problem came up

(Testimony of J. G. House.)

many times that the inspector would spend half a day driving to and from a plant where we would instruct him to stay overnight, and that it was cheaper and he would do a better job by staying at the plant until the inspection was complete rather than driving back and forth. That came up a number of times, in not only the Portland office but all the other offices.

Q. Was there any suggestion as to the number of miles away from the home base that they should try to plan that, or just how was that?

A. I don't recall that there was any set mileage. They were told to drive or not to drive. It was more or less left up to their discretion.

Q. But they were to plan so that they would get a plant finished rather than run back and forth to Portland? [72]

A. That is right.

Mr. Williamson: I think that is all.

### Cross-Examination

By Mr. Anderson:

Q. Now, Mr. House, during that period of time Mr. Hoyt did follow your directive, did he not?

A. So far as I know or recall; yes.

Mr. Anderson: That is all.

Mr. Williamson: That is all.

(Witness excused.) [73]

WESLEY L. BOGARDUS

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williamson:

Q. Where do you live, Mr. Bogardus?

A. Beaverton, Oregon.

Q. By whom are you employed?

A. General Insurance Company of America.

Q. In what capacity?

A. I am the state sales manager for the General.

Q. How long have you been so employed?

A. I have been so employed in the State of Oregon since November of 1953.

Q. Before that time what was your job?

A. I had a similar position in the State of Idaho.

Q. What people were under your supervision?

A. All of the employees in the State of Oregon.

Q. That would include the engineers?

A. Yes, sir.

Q. How many people all told would that include?

A. We have approximately 115 employees in the state.

Q. In 1954 how many engineers such as Mr. Hoyt did you have?

A. I believe we had six in the state. [74]

Q. Are you an engineer?           A. No, sir.

Q. In March of 1954 was there any supervisory employee in Oregon between the engineers and your-

(Testimony of Wesley L. Bogardus.)

self?           A. In the early part of 1954?

Q. Yes.           A. No; there was not.

Q. Was that later changed?           A. Yes, sir.

Q. When was it changed?

A. Later in the year. I don't recall the exact date, but it was in the fall of the year, as I recall.

Q. Of 1954?           A. Of 1954.

Q. What change was made at that time?

A. From the engineering standpoint Mr. Brown was put in charge as supervising engineer in the system, the chief inspector in the state here.

Q. What was Mr. Brown? Who was he?

A. Prior to this time, Mr. Brown was an inspector engineer in the state.

Q. Was he on the same or a different level as far as authority is concerned than Mr. Hoyt?

A. He was on the same level with Mr. Hoyt.

Q. Until this change was made? [75]

A. Yes, sir.

Q. In the latter part of 1954?           A. Yes, sir.

Q. Now, after the change was made how did his job differ from the other engineers?

A. After Mr. Brown took over if the inspectors had any problems which they felt was perhaps above their capacity, or they wanted further advice or help on, they would go to him rather going direct to our office in Seattle.

Q. Did you have trainees on occasion?

A. Yes.

Q. Did Mr. Brown have any particular job in relation to the trainees?



(Testimony of Wesley L. Bogardus.)

A. Yes, sir. He would work with the trainees developing them to senior employees.

Q. Did Mr. Brown during all of this time always retain an area or territory the same as the other inspectors? A. Yes, sir.

Q. Now insofar as you were concerned did you have direct dealings with these engineer inspectors?

A. I would if there was something particular that came up in their territory.

Q. Did they work separately or independently or under direct supervision, or tell the Court how they operated?

A. Each man controls his own territory. There is a certain [76] amount of objects and insurance risks that are assigned to him, and it is up to him to arrange his work in his territory so that he can get around to them within the required time, according to the State or to our own company regulations. He would pretty much run his own territory.

Q. Now were you his direct superior in Oregon at least up to the time that Mr. Brown was so appointed? A. Yes, sir.

Q. If Mr. Hoyt or any of these other inspectors made recommendations, particularly of a technical nature concerning machines, and so on, would you be advised of that fact?

A. If it were a problem in which an agency problem would arise—by “agency” I mean an agent representing our company, between the company and the insured—and it was felt that there was some particular problem there, then I would be. Other-

(Testimony of Wesley L. Bogardus.)

wise, it would be one which the engineer would take up with the home office or handle himself directly with the insured or the agent.

Q. Are you qualified to know anything about recommendations concerning engineering problems of a technical nature?

A. No, sir. I would have to depend on these men.

Q. Did you, in fact, depend on these engineers in that connection?      A. Yes, sir.

Q. Now, Mr. Bogardus, did you on occasion have meetings of [77] a general policy nature which the engineers would be requested to attend?

A. Yes, sir.

Q. Will you just explain those meetings and what they were for.

A. During 1954 we had monthly sales meetings in which we would bring sales representatives and engineers, various men, in from all over the state and would talk to them about problems of the insurance business today, plus that of promoting more new business and servicing that that was on the books.

Q. Were the engineers included in that?

A. Yes, sir.

Q. Were they expected to assist in that wherever possible?      A. Yes, sir.

Mr. Williamson: I think that is all.

(Testimony of Wesley L. Bogardus.)

Cross-Examination

By Mr. Anderson:

Q. Do you mean, Mr. Bogardus, that your inspectors were expected to go out and sell insurance?

A. Their first job, sir, was certainly to inspect the risks from the standpoint of safety, sure. However, if they had time, they were instructed to contact the agents with the possibility of developing more insurance.

Q. You didn't answer my question. I asked you whether the [78] inspectors were expected to go out and sell insurance?

A. No, sir. We don't operate that way in our company. We have to work through the agents.

Q. You have charge of the Oregon setup at the present time?      A. Yes, sir.

Q. You have to report where? To the Seattle office?      A. Yes, sir.

Q. And below you there is a chief inspector in Oregon, is there not?      A. Yes, sir.

Q. And below that comes your ordinary inspectors, like Mr. Hoyt?      A. Yes, sir.

Q. Did you have anything to do with assigning the territory for the inspectors?

A. Very little, sir. That would be left up principally to the chief inspector and his men.

Mr. Anderson: That is all.

(Testimony of Wesley L. Bogardus.)

Redirect Examination

By Mr. Williamson:

Q. By the chief inspector do you mean the man in Seattle?

A. No, I mean principally Mr. Brown here and in co-ordination with our Seattle office.

Q. Before Mr. Brown was made the supervisor how was the [79] territory assigned?

A. Well, in conjunction with the chief superintendent in Seattle the work load was divided up evenly amongst the men, and then they would develop their own territories and develop their own itineraries and the way in which they were to work in the territory.

Q. Do any of the company employees besides the agents actually sell insurance to the public?

A. We can accompany an agent and assist the agent in selling, but we as company employees cannot go direct to the public to solicit insurance.

Mr. Williamson: I think that is all. Thank you.

(Witness excused.) [80]

RACHAEL A. DeVOE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Williamson:

Q. Will you state your name, please?

A. Rachael DeVoe.

Q. Where do you live? A. Seattle.

Q. What is your position?

A. Administrative supervisor in the Boiler and Machinery Department.

Q. Of the General Casualty Company?

A. Right.

Q. How long have you held that position?

A. About nine or ten years I have worked in that department.

Q. How long have you worked for the General Insurance Company altogether?

A. Nearly fifteen years.

Q. Now, then, during the last nine years you have held the position that you now hold?

A. Yes.

Q. Just what are your duties in summary fashion, please?

A. Well, the administration of the office detail, the handling of policies, the personnel problems in respect to the [81] girls and the routine of the office, and I also sit in in an advisory way on overall personnel and our general service to the agents and to the public.

(Testimony of Rachael A. DeVoe.)

A. Entirely to the department.

Q. I see. Now, primarily is your work confined to this department, Boiler and Machinery?

Q. Do you have anything to do with, under your supervision, the figuring out of pay and the determining of overtime and things of that sort?

A. Yes, I do. People in the department who are in the overtime status group; that is, people who are not supervisory, administrative or inspectors, keep a timecard, and I collect those timecards monthly and turn in an overtime report to the payroll department. I don't calculate the amount of money, but I do turn in the amount of time.

Q. Prior to 1953, did you have trainees as well as inspectors? A. Yes, we had.

Q. What is a trainee?

A. It is primarily a man who is new to the insurance business, or new to our company, at least. Some of them are trainees for a short period while they become acquainted with our procedures. Others are trainees while they study for their National Board examination, which is given annually every—I think four times a year.

Q. In other words, they are training to be engineering [82] inspectors?

A. They are training for their National Board commission, yes.

Q. Prior to 1953 were those trainees kept on an overtime basis?

A. No. Let's see. 1953? No.

Q. All right. Now, was that changed later on?

(Testimony of Rachael A. DeVoe.)

A. Yes, they changed in 1953.

Q. Will you tell the Court the occasion for that change coming about?

A. Well, a representative of the Wage and Hour portion of the Government—I don't know exactly what you would say his job is, but he was a representative of the Wage and Hour group—called at the office and reviewed our records for both office people and inspectors and supervisors, and he reviewed all of our people and then came back later for a meeting and informed us that we should keep time records on trainees and that we should turn in their monthly work from these time records for the payment of overtime.

Q. Did you also have a discussion concerning the engineer inspectors?

A. Yes. It was the primary—it was his primary concern, was the inspectors, and particularly in the trainee group. He gave us instructions to keep time records on the trainee group for the reason that they didn't have territories [83] assigned to them. They were not independent. He said specifically if they made over \$325 a month and they were independent, or they organized their own time and took care of their own inspection territory, they would be out of the overtime category.

Q. Now, Mrs. DeVoe, at my request did you go through the hours in Defendant's Exhibit No. 2?

A. Yes.

Mr. Williamson: And I will hand you Exhibit

(Testimony of Rachael A. DeVoe.)

No. 9 for Identification, which I should offer in evidence. Do you have any objection?

Mr. Anderson: No.

(The group of documents referred to, entitled "B. & M. Inspector's Daily Report," was thereupon marked and received in evidence as Defendant's Exhibit 9.)

Mr. Williamson: Will you hand her Exhibit No. 2, please?

Q. First explain to the Court, please, the records that you hold in your hand.

A. The small forms are a record——

Q. That is Exhibit No. 9?

A. Yes. ——are a record of inspection of each individual object for the purpose of compiling the information for the National Bureau of Casualty Underwriters for rating purposes.

Q. Is that information used for the determination of salary, [84] or anything of that sort?

A. No.

Q. As to the trainees, you have them keep time-cards?

A. Regular timecards.

Q. All right. Now, then, what is Exhibit No. 2?

A. This primarily is the same thing. This is the time of inspecting each individual risk for the purpose of reporting to the National Bureau of Casualty Underwriters for rating purposes.

Q. Now why was there a change in that form?

A. Well, simply a clerical matter. This informa-



(Testimony of Rachael A. DeVoe.)

tion was taken into the office, compiled by the girls for an annual report to the Bureau.

Q. Exhibits No. 2 and No. 9, who prepared those?

A. Robert E. Hoyt.

Q. Those are the ones that he actually prepared?

A. Yes, they are.

Q. Now was there a time gap between the change from the form, Exhibit No. 9, to Exhibit No. 2?

A. Yes, there is about three weeks missing in these.

Q. All right. Then other than the three-weeks period was there any other gap?

A. Only for vacation.

Q. At my request did you go through all the time records as indicated in those two exhibits and compare them with [85] Exhibit A attached to the complaint in this case?

A. Yes, I did. This is my comparison here.

Q. That was your comparison. Will you just tell the Court what you found as to the number of hours named in Exhibit A to the complaint and those in the records that you hold in your hand.

A. I don't have the total here for Exhibit A, but comparing each individual week we find no continuity between the two.

Q. What do you mean, you could find no continuity?

A. Well, in my records there would be two hours maybe appear and in his it would be maybe ten, and the next week there would be a difference. I couldn't come to the conclusion that he had used the

(Testimony of Rachael A. DeVoe.)

same records he had turned in to our company in making his Exhibit A.

Q. Nevertheless, did you go through the records that he had turned in? A. Yes.

Q. And add up the number of hours?

A. Yes.

Q. That is, that would have been over 40 hours a week? A. Yes, I did.

Q. According to his records? A. Yes.

Q. What did that amount to?

A. 248 and three-fourths hours. [86]

Q. That was based on what kind of a work week?

A. That is the same work week he had, which is Monday of every week through Sunday of every week.

Q. What is the work week that you actually employ in the company?

A. Our payroll in the personnel department uses the standard calendar week, Sunday through Saturday.

Q. Did you compile it according to his own records during that period of time?

A. Yes. There is only ten hours difference in the total period. There is ten hours less in the standard calendar week.

Q. Is there any way that you can check Exhibit 2 and Exhibit 9 to find out whether or not the inspections as shown there actually were made in the field by the inspectors?

A. Yes, I did that to the best of my ability.

Q. How would you do it?

(Testimony of Rachael A. DeVoe.)

A. The inspector keeps inspection slips or work slips in his possession while he is inspecting the individual objects, and when the policy is rewritten or canceled or the coverage on the objects are changed in any way we recall those slips from him and we keep them for the statute of limitations. And I went back over those old inspection forms to check out some time recorded here.

Q. Are those those yellow cards? [87]

A. Yes.

Mr. Williamson: I will offer Defendant's Exhibit 3 for Identification in evidence.

The Court: Admitted.

(The blank yellow forms referred to were thereupon marked and received in evidence as Defendant's Exhibit 3.)

Q. (By Mr. Williamson): I will hand you Exhibit No. 3, Mrs. DeVoe. Is that the record that you have reference to?

A. We keep the old ones in the office after they are recalled from the inspectors.

Q. How does the inspector use those cards, Exhibit 3?

A. Supposedly when he inspects an object he enters the date in the lower part of the card for each object inspected. If he inspects the entire plant, the date should be on the pink work slip.

Q. What?

A. On the pink one there should be the date some place on there.

(Testimony of Rachael A. DeVoe.)

Q. Now explain, if you will, please, who makes up those yellow cards initially?

A. The office writing the policy.

Q. That would be the local office? A. Yes.

Q. Then what happens to them? [88]

A. The original of the yellow slip is given to the inspector and a carbon copy is retained in the office.

Q. Now, when the inspector goes out and makes an inspection he makes a record of that inspection on the card?

A. On this card. Those are actually our only record of an inspection by individual objects.

Q. If the inspector does not have to make a report to the State of Oregon, for example, if the inspector has no recommendations to make—in other words, if what he inspects meets with his approval, does he make any record other than on that yellow card? A. No.

Q. Does he make any record that is submitted to the home office? A. No.

Q. That is a record, then, under those circumstances that he makes to himself showing when he made the inspection? A. Yes.

Q. All right. If he is making a State report, he would then make a note on the yellow card and also send in a report to the State?

A. Yes; that is right.

Q. Did you then check Exhibits 2 and 9 as against your yellow cards?

A. Yes; I spot-checked them. I think I did

(Testimony of Rachael A. DeVoe.)

around a hundred [89] checks; I checked 100 cases.

Q. Would you tell the Court the result of that check?

A. Well, I would say in—well, actually, in 53 per cent of the cases there was no record on the yellow card. Then to check further on it I personally called at the State of Washington Department of Labor and checked their records, and in many cases I was unable to find a record of inspection in the State office. Of course, they would only have a record if it were an internal inspection of a boiler or a tank.

Q. Could you tell from Exhibits 2 and 9 whether it would be an internal inspection or not?

A. No; not on 2 or 9; no. On No. 3 supposedly an internal inspection should have been underlined. But in most cases there was no date on these cards.

Mr. Williamson: Now, I will hand you what has been marked Exhibits 4, 5 and 6, and I will offer those exhibits in evidence.

The Court: Admitted.

(Three blank boiler inspection forms were thereupon received in evidence as Defendant's Exhibits 4, 5 and 6, respectively.)

Q. (By Mr. Williamson): By referring to the exhibit number at the top of each page, would you just briefly explain what [90] each of those exhibits are?

(Testimony of Rachael A. DeVoe.)

A. Well, the first form, the survey form, is issued by the office to the inspector to get him to give us a list of the objects for rating purposes and his remarks about any differences in underwriting conditions that he can note; not only differences but also any recommendations or rating information. The next one is the order for the first inspection which is given to the inspector as soon as the risk is bound. He again lists the objects that are insured and makes comments or recommendations on the back of it, both of an underwriting and safety nature. The next report is a form—it is our own form. However, they—it is an exact copy, the front of it, of the American Society of Mechanical Engineers report of inspection for code boilers or tanks. The back of it is a general inspection form, one of our own forms, and it is a narrative report of the conditions found on inspection. The fourth one is the Boiler Data Report. It is a form that is used in some states and not in others. It is information as to the actual construction of the boiler. It is made out usually at the first inspection in the states that require it. However, some states do not require it.

Q. Do the inspectors such as Mr. Hoyt make out all those reports?      A. Yes.

Q. Where is the initial report sent? [91]

A. The initial report? By that you mean the survey form?

Q. The first form that is made on a new risk

A. They are returned to the office issuing them

(Testimony of Rachael A. DeVoe.)

and the office would be the office receiving the order from the agent for the policy.

Q. Who would get a copy, if anyone?

A. One would be retained in the office and the original would go to the inspector.

Q. The original would go to the inspector?

A. Yes.

Q. All right. Now, then, on the report forms, who gets copies of those?

A. You mean after the inspector makes out the inspection report who gets copies?

Q. No. In other words, after a new risk is taken on and you make your initial inspection, just your ordinary, routine inspection.

A. Well, the inspector, if it is a State inspection, sends a copy to the State. If he has any recommendations, he also sends a copy to his local office, and the inspection report later is typed. There is an extra carbon made—a couple of copies go to the insured, a copy to the agent, a copy to the inspector and a copy to be retained in the office files.

Q. In other words, if a recommendation is made on the inspector's report a copy of that is then sent to the assured? [92]

A. Yes.

Q. Now are there changes made in those recommendations before they are sent out?

A. Only editorial changes.

Q. What do you mean by editorial changes?

A. Mistakes in grammar and spelling. We do, however, have a book of recommended wording for inspectors.

(Testimony of Rachael A. DeVoe.)

Q. To cover the same situations?

A. Yes. An inspector actually, instead of writing out the full recommendation, can give it a number. All of the inspectors have a copy of that book and also the typists who type it later.

Q. Then as far as the recommendation that the inspector makes is concerned, is there any substantial change by the time the assured receives a copy of it?      A. No.

Q. Did you in checking these records, Mrs. DeVoe, check anything concerning the miles driven by Mr. Boyd?

A. Yes, I did. I checked the records of the inspector's time turned in as against his expense accounts in an effort to see whether or not there was excess driving back and forth between the Weyerhaeuser plant in Longview and his home. Nearly every expense account has at least two or three evening meals charged to the company because of driving home late in the evening. [93]

Q. Would those be on consecutive days?

A. Sometimes.

Mr. Williamson: I think that is all.

### Cross-Examination

By Mr. Anderson:

Q. Mrs. DeVoe, you said you had some conversation with some public officer about whether or not these inspectors were subject to the Wage and Hour Act?      A. Yes.



(Testimony of Rachael A. DeVoe.)

Q. Who was that? A. Mr. Henderson.

Q. With officers in Seattle?

A. I don't know where his office is.

Q. And he told you that these inspectors were not under the Fair Labor Standards Act? Is that right? A. Yes.

Q. That is what you acted upon? A. Yes.

Q. Now, there was a time when Mr. Hoyt was required to put in all of his time or report his full time to your office, wasn't there, travel time and all?

A. His time for the purpose of reporting to the National Bureau of Casualty Underwriters, you mean?

Q. There is an exhibit upon the Clerk's desk—I think it [94] is No. 1. A. Yes.

Q. You have the original of that in your possession, don't you?

A. I would like to check the dates before I say.

Q. Yes.

A. Yes, we have copies of these originals.

Q. Do you have them here?

A. Yes. Not all of these. I think we only have 1954. I see there is '53 in here.

Q. I see. How late does that run?

A. June 11th, 1954.

Q. June 11th, 1954. Up to that time Mr. Hoyt was required to report to your office the full time worked every day, wasn't he?

A. He was required to report to us the inspections he made during that day. He was not re-

(Testimony of Rachael A. DeVoe.)

quired to make an eight-hour report, an eight-hour-working-day report.

Q. In any event, you did receive daily a daily record of the time that he worked? A. Yes.

Q. Have you checked that period of time as against Exhibit A to the complaint, and doesn't it conform?

A. Of course, this is only part of the period.

Q. Yes. I am speaking of that particular part of the period. [95] It conforms, doesn't it?

A. I can't say for sure unless I look back against my records. Generally for the whole period he is claiming it doesn't check out exactly.

Q. As a matter of fact, however, after June you instructed him not to report any time except the time that he was in the actual inspection of objects? A. I believe that is correct.

Q. Then you kept no record of his time at all, did you, in the Seattle office?

A. Yes, we kept a record of his time. This is from an annual report, made up once a year.

Q. You do have a record of the actual time worked up to June of 1954, don't you?

A. Yes, I would say so.

Q. And after June, 1954, you instructed him not to send up that record any more, didn't you?

A. We gave him a new form to complete.

Q. And that didn't ask for his travel time to be reported? A. That is right.

Q. So you have no record of that at all?

A. Only what he turned in.

(Testimony of Rachael A. DeVoe.)

Q. Yes. Now, about those yellow forms, assuming that Mr. Hoyt was called by Weyerhaeuser at Kelso or Longview just to check up on something that had been done, an informal call, [96] he was expected to go out there, wasn't he?

A. If he was called by Long-Bell, I would say he was, yes.

Q. And if he was called out there just to check on something casually, would he make a report on one of those yellow sheets?

A. Well, I think he would.

Q. Do you know whether he did or not?

A. I wouldn't know. No, I don't know.

Mr. Anderson: I have no further questions.

Mr. Williamson: That is all.

(Witness excused.) [97]

### STERLING McINTYRE

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Williamson:

Q. Where do you live, Mr. McIntyre?

A. I live on Vashon Island, Washington.

Q. What is your position with the General Casualty Company?

A. I am Manager of the Boiler and Machinery

(Testimony of Sterling McIntyre.)

Department wherever we write business in the United States.

Q. How long have you held that position?

A. I have held that position since April 1st, 1953.

Q. Are you personally trained in engineering work?

A. No, sir. I am not personally trained in engineering work.

Q. Is your job primarily administrative in character?

A. My job is primarily administrative in character.

Q. Does your job encompass all of the work in that particular field? In other words, do you have all of the agents, supervisors, inspectors, clerks and so on all under your department?

A. Yes, I have the responsibility for the whole operation.

Q. Now on whom does your department depend for its technical knowledge and information?

A. From the resident inspectors in the [98] territory.

Q. Would that include such people as Mr. Hoyt?

A. Yes, it would.

Q. Do you employ any independent engineers or technicians or anyone outside the company to consult with on these problems?

A. No, we don't, unless under unusual circumstances—if our people felt that they didn't have the

(Testimony of Sterling McIntyre.)

information, we might call outside advice, but that is only on very rare occasions.

Q. As a matter of routine, in obtaining information as to the risks that you are handling, the repairs that are to be made, and so on, you depend on these engineers in your department?

A. Yes, we do.

Q. Are these engineer inspectors that you employ working under direct supervision, or how do they work?

A. The bulk of our inspectors do not operate under direct supervision. Most of them are independent of direct supervision. Now, employees would be under direct supervision, but older, established people, no.

Q. How do they work?

A. The inspector in the territory is responsible for all the boiler and machinery accounts written by the company. It is his responsibility to organize his own territory and to plan his work so that he can satisfy the company that the [99] risks they write are safe or that they are maintained in safe operating condition. And they also discuss problems of the business with the management of our insureds.

Q. Do these men make recommendations to the company of all kinds?

A. Yes, they do.

Q. Would you just tell the court what kind of recommendations these men customarily make?

A. The recommendations made are largely ones pertaining to safety.

(Testimony of Sterling McIntyre.)

Q. Are they technical in nature?

A. Largely, yes. They may also include minor recommendations which would improve the general operation of the insured plant if he felt it was to the insured's interest.

Q. Do they ever make any underwriting recommendations? A. Yes, they do.

Q. Such as what?

A. Well, we recently had a case where the losses were continuing to be excessive, and the inspector made a recommendation that a \$500 deductible be applied to the risk and, in addition to that, that there should be a longer waiting period before the loss-of-income coverage would apply, and, third, that they have at least another engineer on the premises during the night hours, and that if we couldn't get compliance with that then we should retire from the risk. [100] And we did just that.

Q. Do the inspectors make recommendations concerning loss prevention and things of that sort?

A. Yes, they do. That is their main responsibility.

Q. Would that encompass not only changes in the mechanical structure of the machine or repair to the machine, and so on, but as well to personnel training?

A. We are as much concerned with the caliber of the employee and the training of them in the machine plant as we are the machine. A perfect machine can fail because of improper operation by the operator himself.

(Testimony of Sterling McIntyre.)

Q. Are the inspectors supposed to size up or calculate the type of personnel that is employed in the insured plant?      A. Definitely, yes.

Q. Do they ever make any recommendations concerning agency problems and policy problems of the company?

A. By agency problems you mean the insurance agent?

Q. Yes.

A. And not an employee of the company?

Q. Yes.

A. Yes, they do, because they live in the area where the agent resides, and they are as concerned with the agent's attitude toward the company as anyone else because it can affect the company's business.

Q. Do those inspectors consult with the agent on occasion? [101]

A. The inspectors do consult with the agent and are so instructed. When they go into a territory and they find adverse conditions existing in a plant, they are asked to advise the local agent and solicit his aid in getting these things carried out.

Q. Now, Mr. McIntyre, in the general run of things are the recommendations that these men make handled by the home office, or how are they handled?

A. The recommendations by the inspector during the period in question, for about the first nine months of the period we are discussing——

(Testimony of Sterling McIntyre.)

Q. You mean from about March of 1954?

A. From March 1st, 1954, until about December, 1954, the recommendations were made by the inspector himself and would come into the office to be typed out and edited as far as grammatical errors were concerned and sent out to the insured, to the agent, and a copy to the inspector.

Q. Would there be any follow-up from the home office or from any other inspector?

A. The home office made no follow-up. We expected the inspector to follow up himself individual recommendations which he felt were serious enough to warrant it.

Q. Then the inspector would deal directly with the insured in connection with those recommendations?

A. The inspector deals directly with the insured in the [102] majority of, if not all, the recommendations that are made, yes.

Q. Then if there is a conflict between the insured and the inspector, what happens then?

A. If there is a conflict between the insured and the inspectors, the inspector reports that to the office on the risk, and the salesman who is handling the account will discuss it with the agent and ask him if he can prevail upon the insured to get these recommendations carried out. Oftentimes the inspector, the agent, the salesman and the insured discuss it. If we feel it is serious enough, we



(Testimony of Sterling McIntyre.)

may retire from the risk or we may modify the coverage.

Q. Mr. McIntyre, did you ever have occasion to discuss with the inspectors, including Mr. Hoyt, during the time in question from March of 1954 until May of 1955 concerning travel time?

A. Yes. Upon arrival in April of 1953, being a new manager of the department, most people wanted to know what my policies would be, and we established those on initial meetings and periodically through the three years that I have been with the company, or three and a half years. I talked with these groups of people about operating a territory in the most efficient manner, and definitely, from reviewing the expense accounts, to reduce travel back and forth and to stay in a territory or plan their itinerary so they were [103] gone three or four or five days, if need be, and then return home, and not commute back and forth where little productive work is done.

Q. After you took over, did you have occasion to review Mr. Hoyt's reports in connection with that?

A. Yes, I did review Mr. Hoyt's reports and saw that he was not complying with the intent of the directive at these general meetings which we held, and thereafter I did have correspondence with the Portland office regarding it.

Q. I will hand you what has been marked Exhibit 8 for Identification. What is that, Mr. McIntyre?

(Testimony of Sterling McIntyre.)

A. This is a letter from me dated December 23rd, 1954, to Mr. Richard Stevick of the Portland office, who was the administrative manager under Mr. Bogardus at that time.

Q. That was concerning what?

A. This was concerning Robert E. Hoyt.

Q. On what subject?

A. Well, the subject was in regard to excess travel time for Mr. Hoyt.

Mr. Williamson: I will offer that exhibit in evidence.

The Court: Admitted.

(Copy of letter dated December 23, 1954, was received in evidence as Defendant's Exhibit 8.)

Q. (By Mr. Williamson): What was the reason for your [104] objecting to Mr. Hoyt's accounts in that respect, Mr. McIntyre?

A. The time of an inspector in the plant is the most valuable time that there is, and if the man spends half a day driving to and from the premises there is very little productive time devoted to that most productive work. Therefore, we would rather pay the expense of room and board and have the man live in a territory until the work is done than to have him commuting back and forth to the job.

Mr. Williamson: I think that is all.

(Testimony of Sterling McIntyre.)

Cross-Examination

By Mr. Anderson:

Q. Your office is in Seattle? A. Yes, it is.

Q. You are chief of the Seattle office?

A. Not the chief. I am manager of the department.

Q. What is your relationship to the chief inspector in Oregon?

A. We have no chief inspector in Oregon. There is a supervising inspector.

Q. I see. But you are over him, I take it?

A. Yes, I am. Not directly over the man from a professional standpoint in the department, but administratively. Mr. Bogardus [105] has the direct responsibility for him.

Q. He is subject to your orders, is he not?

A. Not exclusively. My orders usually are executed through the administrative office of Bogardus. From a technical standpoint, he would give instructions pertaining to the technical aspect of his work.

Q. During 1954 did you at any time give Mr. Hoyt a direct order that he should not use his car from here to Kelso? A. No, I didn't.

Q. In fact, he never received such a direct order from any officer of the company, did he?

A. Personally I didn't talk with Mr. Hoyt. My correspondence was with the Portland management, who I am sure did so.

(Testimony of Sterling McIntyre.)

Q. You are sure that they gave him a direct order not to use his car between here and Longview?

A. I couldn't vouch for the method in which that was conveyed, no.

Q. In fact, you don't know anything about it, do you?      A. Pardon?

Q. You don't know anything about it, do you?

A. I don't know what conversation transpired between Mr. Hoyt and the Portland management, no.

Q. What I am trying to say is that you don't have any information with relation to any direct order given to Mr. Hoyt regarding the use of his car or staying over in [106] Longview or elsewhere?

A. I have talked to Mr. Hoyt in a group of inspectors about twice a year, with very definite instructions not to commute to the job. Now, I didn't mention specifically Longview, no.

Q. I see. Were your directives carried out?

A. To the best of my knowledge, the spirit of it was carried out, but it appeared in this particular case that it ultimately was not.

Q. Did you then have occasion to discharge Mr. Hoyt?

A. I didn't discharge Mr. Hoyt, although in conversation with Mr. Bogardus, the Portland manager, it was agreed that that would be necessary, yes.

Q. You directed his discharge?

(Testimony of Sterling McIntyre.)

A. I wouldn't say that I directed his discharge. Mr. Bogardus and I don't operate on that basis.

Q. You concurred, then, with Mr. Bogardus?

A. Yes, I did concur with Mr. Bogardus on that point.

Q. And Mr. Bogardus consulted you about it and asked your opinion about it?

A. Yes, he did.

Q. And that came about as a result of this thought you had about him using his car more than he should?

A. That was only part of it. There are other factors involved here which brought this about which didn't have a [107] direct bearing on the hours in question.

Q. I see. Now you have been in this insurance business a long time, have you not?

A. Yes, I have.

Q. Boiler inspection and machine inspection?

A. I have never done any boiler or machinery inspection work.

Q. I am speaking about companies. You are familiar with the operation of companies carrying these risks?

A. I have been in this business since 1939; yes.

Q. Have you been employed by other insurers having similar risks?

A. Yes, I have.

Q. What other companies?

A. I was employed by the Hartford Steam Boiler Inspection and Insurance Company.

Q. In what state?

(Testimony of Sterling McIntyre.)

A. Originally in 1939 in Hartford, Connecticut, as assistant to the superintendent of rate table coding.

Q. Did you ever work for Hartford Insurance Company?      A. Pardon?

Q. Were you ever employed by Hartford Insurance Company?

A. This is the Hartford Steam Boiler Inspection and Insurance Company to which I have reference.

Q. I am not sure I understand you. I am asking were you [108] ever employed by Hartford Insurance Company.

A. Well, the term "Hartford" applies to quite a number of different insurance companies. I was employed by a firm known as the Hartford Steam Boiler Inspection and Insurance Company in Hartford and in San Francisco. In San Francisco, if I may just elaborate a little bit, I was a salesman in San Francisco promoting this line of insurance for seven years.

Q. You are generally familiar, then, with procedures throughout the states, are you not?

A. Yes.

Q. And they are generally uniform, aren't they? The duties of an inspector in Oregon under your setup are about the same as they would be in other states?

A. No, they do vary a little bit from state to state. State laws do vary, and in some states there are no laws.

Q. I am speaking now of the general duties of

(Testimony of Sterling McIntyre.)

an inspector in relationship to the company and the job.

A. Are you talking about our company alone or all companies?

Q. I am speaking of companies generally in the same field.

A. Companies vary from one to another. I can't vouch that they are all alike, no. I would say they are not.

Mr. Anderson: That is all. [109]

### Redirect Examination

By Mr. Williamson:

Q. Mr. McIntyre, can you state whether or not there is any difference between the way the inspectors were handled in the Hartford Company and the way they were handled in the General Casualty?

A. Yes, I can. Having worked for some thirteen years with the Hartford and about three with this company, I think I can speak as to the comparative jobs that they do handle.

Q. Will you explain that, please.

A. The Hartford Steam Boiler Inspection and Insurance Company deals with no other line of insurance. All that they sell is boiler and machinery insurance. The General Casualty Company is a multi-line insurance company. Perhaps only 1 per cent of our business is boiler and machinery and the balance is fire and casualty and allied lines. So

(Testimony of Sterling McIntyre.)

that the type of work that an inspector does with our company is considerably different from that which he did with the Hartford Steam Boiler and most other companies. We expect our men to be able to handle not only boiler and machinery inspections, but elevator inspectors and other casualty inspections and sales work to a limited degree on those minor or small types of accounts such as can be easily rated other than your big industrial accounts which call for a specialist.

Q. Are the inspectors in Hartford under more or less [110] supervision and direction than the inspectors in your department?

A. The inspectors under the Hartford Steam Boiler are much more limited in their responsibility and are much more closely supervised. Everything is put on a very special form. There is a form for every class of equipment insured. Our men evaluate risks themselves and write in their report on the over-all risk and its desirability.

Mr. Williamson: I think that is all. Thank you.

### Recross-Examination

By Mr. Anderson:

Q. By the way, I take it you are very familiar with the Hartford Insurance Company inspection program? A. Yes, I am.

Q Do you know that the hours of employment per week with the Hartford are expected to fluctuate and run anywhere from 40 to 60 hours?



(Testimony of Sterling McIntyre.)

A. Yes, I am.

Q. Is there any difference between that and your Oregon setup?      A. Yes, there is.

Q. What is the difference?

A. Well, the inspectors with our company are not required to spend hours and hours writing out reams of detailed reports. [111] We have eliminated about all of this red tape, so that the man can work a 40-hour week and get his report in in a summary manner, without having to fill out this multiplicity of forms, which was such a bearcat to deal with in Hartford.

Q. You know, as a matter of fact, that Hartford assigns about 1,200 customers to each inspector?

A. No, they don't.

Q. You don't remember that?

A. No, they don't.

Q. How many?

A. They are assigned on the basis of the number of insured objects. There may be one plant where 1,200 objects are insured, but not 1,200 customers, no.

Q. How many objects generally does an Oregon man have to inspect?

A. I think that is something that is almost impossible to establish on an average rate, because the type and number of objects—you can assign to one man 500 objects and to another man 2,000 objects, and the man with 500 could have more work to do than the man with 2,000 because of the nature of

(Testimony of Sterling McIntyre.)

the inspection. If you take a high-pressure water-type boiler, a man could spend a week inspecting, as compared with another plant with 500 wheels in some line-shaft arrangement in a factory, where he could run down in five minutes and look at each wheel. That is not a true criterion of the [112] work involved.

Q. Isn't it a fact that Mr. Hoyt had about 1,500 accounts to service?

A. He never had 1,500 accounts to service, no.

Q. How many did he have?

A. That would have to be verified. I honestly don't know how many accounts he had. He could have had 1,500 objects to inspect.

Q. Then you don't know what the relationship or the difference is between the work of a Hartford inspector in the field and one of your own inspectors?

A. Yes, I do.

Q. Hartford has a chief inspector in each area under which the other inspectors are employed; isn't that true?

A. Yes, it has.

Q. The same as in this state, isn't it?

A. We have no chief inspector in this state.

Q. You mean you have never had a chief inspector in this state?

A. No, we haven't.

Q. Do you have a chief inspector in Seattle?

A. We have had. We didn't have during the bulk of the time that Mr. Hoyt is questioning his wages.

Q. When you do have such a chief inspector, the other inspectors are subject to his directives? [113]

A. Yes.

(Testimony of Sterling McIntyre.)

Q. The objects which these inspectors for Hartford inspect are such things as steam boilers, pressure vessels, and machinery of various types?

A. Yes.

Q. Your Oregon inspector has the same problem, does he not?      A. That plus much more.

Q. Well, machinery of various types includes quite a lot of territory, doesn't it?

A. Not necessarily. A man might have a territory right here in Portland and never go out of it.

Q. I am speaking now of the term "various types of machinery." That is a rather embracing subject, isn't it?

A. The term "machinery" is rather limited when you consider the type of equipment that we insure. We don't insure all kinds of machinery. There are fairly specific types and kinds that we insure.

Q. Now, an inspector for Hartford and for your company, too, are charged with determining in the first instance the suitability of the objects from the standpoint of safety and the suitability for continued operation; is that not true?      A. Yes, they are.

Q. Is there any distinction there between your Hartford inspector and your inspectors? [114]

A. In the way we do it I think there is, yes.

Q. What difference?

A. The Hartford inspector has a standardized

(Testimony of Sterling McIntyre.)

report. He doesn't go along and evaluate it from the standpoint of an independent engineer the way our people do. He has a stock form which says boiler inspected for thus, thus and so. There are copies of these forms which outline in great detail exactly what he must report. We don't require our people to do that.

Q. Isn't it a fact that you provide your inspector with books showing details on how the inspection should be made and what to report?

A. No, we don't.

Q. You don't provide any such material to your inspectors at all?

A. We provide reference books which are put out by the National Bureau as to what the State and National safety requirements are. We don't put out a textbook of instructions to the inspectors as to how they shall inspect anything.

Q. Do you furnish forms for your inspectors upon which you expect them to report to the branch office and to your main office?

A. A limited number; yes.

Q. And does your inspector spend as much as 20 per cent [115] of the time in inspecting these objects?

A. I can't say an inspector should spend 20 per cent of his time inspecting objects.

Mr. Williamson: Your Honor, what do you mean by inspecting objects?

Mr. Anderson: How much time is spent in this

(Testimony of Sterling McIntyre.)

inspection work and how much time is spent in clerical work or driving, generally speaking?

A. Well, the man's job is inspection work. Part of his time is spent in evaluating risks.

Q. In other words, more than 20 per cent of his time is spent in the actual inspection of physical objects? Is that right or not?

A. I wouldn't say that you could exactly put a percentage on the amount of time actually spent in the physical examination of objects. A lot of time goes into determining whether or not they have a sound maintenance program, what the operator knows or what he doesn't know, and waiting for the boiler to be opened. When you ask me to give the amount of actual inspection time, I think you would have to be definite. I can't vouch for the fact that they spend 20 per cent of their time. I don't know.

Q. Do you think he spend more than 80 per cent of his time on clerical work?

A. No, I don't. Neither do I think that necessarily more [116] than 20 per cent of his time is spent in the physical examination of machines. The man behind a machine, travel time, reports, as well as the over-all picture must be taken into consideration.

Q. Isn't it a fact that your company has issued a directive to all your inspectors that they must not suspend a risk; that they must not condemn a boiler on the spot?

A. That is right. That is serious business.

Q. Yes.

(Testimony of Sterling McIntyre.)

A. That is, if you want to suspend insurance.

Q. You are apt to lose a customer, aren't you?

A. You are liable to lose a customer.

Q. So you have directed your inspectors to refrain from doing anything of the kind? You have directed that they must not suspend an object or condemn a boiler, as it were?

A. That is right. Wait a minute. Now you went on a point further there and said we must not allow our inspector to condemn a boiler. They frequently do condemn boilers, but they usually—if they are going to go that far, we feel we would like to discuss it. Not that we are going counter to the inspector, but we would like to know before the thing is kicked clear out.

Q. But the actual suspension is accomplished from your head office by your chief inspector, isn't it?

A. In the three years I have been here we have suspended [117] insurance three times at the most. That is a rare case, and I think has little or no bearing on it.

Q. Your chief inspector did that, made that order?

A. He did not; no, sir.

Q. Who made the order?

A. In the case in question there was no suspension issued. If I may clarify the point for you, on the Warm Springs Lumber Company case, which Mr. Hoyt has cited, it was stated by the inspector that a particular thing was not desirable, and he made recommendations for improvement. The in-

(Testimony of Sterling McIntyre.)

insured said they considered it safe. I wrote a letter to the insurance agent asking that we be retired from the risk or that this particular machine be endorsed off the policy. We gave him ten days to do that. Ultimately the insured was satisfied that it was so, and eventually went down after this thing had been endorsed off to find out what the trouble was. But there was no suspension issued.

Q. What I am asking you is this: Isn't it a fact that you do not permit your inspectors to make any on-the-spot suspensions or terminations of equipment? A. That is right.

Q. Now, most of your inspectors are recruited from the field of operating engineers and marine engineers, aren't they?

A. Many of them, yes. [118]

Q. How many inspectors do you have working under the supervision of the Seattle office?

A. Pardon me. By the Seattle office you mean the home office?

Q. Yes. A. The home office employees?

Q. Yes. A. There are about 25 inspectors.

Q. How many of those men have a college degree in engineering? A. None of them.

Q. I take it that when you hire these inspectors you give them a short training course of a week or two in operating instructions?

A. It depends upon the qualifications of the inspector when we hire him. If the inspector, as in the case of Mr. Hoyt, had been a previous employee of another company and has a National Board ticket,

(Testimony of Sterling McIntyre.)

very little training is required other than perhaps two or three weeks of training as to our company procedures as contrasted to his former employer. If the man comes to us with no previous training, doesn't have a ticket, then it may take three months to a year before we think that man is capable of accepting a territory, or three months before he is qualified to take the examination. [119]

Mr. Anderson: That is all.

Mr. Williamson: That is all.

(Witness excused.)

### CHARLES F. BROWN

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Williamson:

Q. Mr. Brown, where are you employed by the General Casualty Company?

A. Portland, Oregon.

Q. What is your job?

A. Supervising inspector.

Q. How long have you held that job?

A. Oh, since December, 1954.

Q. Before that time what did you do?

A. Inspected.

Q. You were an inspector before that?

A. Yes.



(Testimony of Charles F. Brown.)

Q. For how long have you worked for the General altogether as an inspector? [120]

A. About fifteen years.

Q. Up until December of 1954, you were classified as an inspector? A. Yes.

Q. Did you do the same kind of work that Mr. Hoyt did? A. Exactly.

Q. Was Mr. Hoyt under you before December, 1954? A. No.

Q. Were you on an equal basis?

A. We were on a par.

Q. Who was your immediate superior in Portland? A. Mr. Bogardus.

Q. Do the inspectors work under direct supervision, or how do they work?

A. Well, they are more or less on their own. They have to be on their own. They can't call for advice every time they look at a boiler.

Q. Do you have your own territory now?

A. Yes, sir.

Q. Do you plan your own itinerary?

A. Yes, sir.

Q. And make your own reports and recommendations? A. Yes.

Mr. Williamson: I think that is all. [121]

### Cross-Examination

By Mr. Anderson:

Q. You make recommendations to whom, Mr. Brown? A. To the insured.

Q. Do you also make recommendations to your

(Testimony of Charles F. Brown.)

company?           A. Yes, sir.

Q. You are supervising engineer now?

A. Yes, sir.

Q. As a boiler inspector what particular literature does your company supply you with by way of technical guide books or instructions?

A. We don't have any guide books now. We used to have one years ago.

Q. You don't have any at all now?

A. No, sir.

Q. Do you know whether any of the other inspectors are provided with these guide books?

A. No. If you have any textbooks you buy them on your own.

Mr. Anderson: That is all.

Mr. Williamson: That is all.

(Witness excused.)

Mr. Williamson: The defendant rests, your Honor. [122]

### ROBERT E. HOYT

the Plaintiff herein, was recalled as a witness in his own behalf, in Rebuttal, and was further examined and testified as follows:

#### Direct Examination

By Mr. Anderson:

Q. Mr. Hoyt, while you were employed as an inspector by the General Insurance Company were you provided with any particular printed rules or guides?           A. Yes, sir.

(Testimony of Robert E. Hoyt.)

Q. Tell the Court what the company provided you with of that character?

A. We had a bound book called "Safety Appliances" about two inches thick, with different inspection procedures on every kind of equipment and things that we were liable to run into.

Q. Was that book published by the General Insurance Company?

A. Yes. It was in loose-leaf form, and we were to add to that every now and again when there would be a different policy or procedure come out from the chief inspector.

Q. What was the nature of those instructions?

A. Well, it would show you what to look for on different objects, where they were most likely to fail, and recommended repairs, and so forth, to that object. The name of that book was "Safety Valve," of which that Exhibit No. 8 there, I believe, is taken from it. [123]

Q. One other thing: Mrs. DeVoe spoke of some yellow forms. What was the function of those forms?

A. I believe that was those work cards?

Q. Yes.

A. Well, that was primarily a record of your objects that you would have in the various plants and your boilers and machinery and equipment, and so forth.

Q. Did that cover all the inspection trips you made?

A. Oh, no. Absolutely not. For instance, in the

(Testimony of Robert E. Hoyt.)

State of Washington they only required a report every two years on certain objects, heating boilers and tanks, so consequently we only sent into the Bureau of Labor at Washington a report once in two years.

Q. On those trips you had no use for these yellow cards?

A. Oh, yes. We used them to count our objects. For instance, in the Weyerhaeuser plant there was 750 objects insured there. If I took one particular mill that had maybe 40 or 50 objects in it, I would just note a date on there and sometimes I wouldn't even do that, because the truth of the matter is I would no sooner get home than they would call me again the next day. I had other business in different parts of the State of Oregon, and that was a continuous job. You was never through with that job. Those cards were issued once for the period of a three-year policy, and if I remember right I think there is only places for 12 marks [124] on there, 12 dates. So you had to be very careful marking them or you would be out of space on them.

Q. Now what was the nature of this controversy about your travel time or whether you should stay over at some points of inspection? Tell the Court about that.

A. Well, that was a point of argument. As a general rule, where you didn't have instructions, they told you when you were 50 or 60 miles from your home base to come home. As a matter of fact, I had those specific instructions here for the State of Ore-

(Testimony of Robert E. Hoyt.)

gon, that they will not pay my bills if I am less than 60 miles from home. Well, Longview, Washington, is, I think, 45 or 46 miles, something like that, from Portland, and I had been coming home every night. Once every year it is required to inspect our logging camps. Now they have over there in Cowlitz County in logging equipment the whole west slope of Mt. St. Helens. And I think I was working that territory for about ten days or two weeks there. When I would hit the highway there was no place to buy a room or stay overnight or a meal or anything else. Usually they will feed you in a logging camp at lunch hour, but when I would hit the main highway coming down off of there I would around Kalama, Washington, some place, which I believe is a matter of 30 miles from home, and I could see no sense, rhyme or reason to go back to Longview and buy a hotel room. There was some days there when I would drive around that [125] mountain and I would run 150 or 200 miles driving time, but it was necessary to get them their operating permits from the State of Washington.

Mr. Anderson: Your witness.

### Cross-Examination

By Mr. Williamson:

Q. Those yellow cards, Mr. Hoyt, that you just spoke of, what is the purpose of those?

A. That shows the objects that are insured.

Q. What are the blanks in there with dates on them? What are they for?

(Testimony of Robert E. Hoyt.)

A. That is to note your inspections.

Mr. Williamson: That is all.

(Witness excused.)

Mr. Anderson: We have nothing further, your Honor.

Mr. Williamson: The defendant rests, your Honor.

(Thereupon the matter was argued to the Court by counsel and the Court took the cause under advisement.) [126]

### REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on October 2, 1956, I reported in shorthand the proceedings occurring in the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages 1 to 126, both inclusive, constitutes a full, true and accurate transcript of said proceedings so reported by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 8th day of December, 1956.

/s/ JOHN S. BECKWITH,  
Official Reporter.

[Endorsed]: Filed December 12, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Amended Answer, Pretrial Order, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Cost Bond, Statement of Points, Designation by Appellant of What to Be Included in Record, Order to Transmit Exhibits, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8496, in which Robert Emmett Hoyt is the plaintiff and appellant and General Insurance Company of America, a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings filed in this office in this cause. Plaintiff's exhibits 1, 2, 3, 5, 6, 7, 8 and 9—and Defendant's exhibits 2, 3, 4, 5, 6, 7, 8 and 9 are being forwarded under separate cover.

I further certify that the cost of filing the Notice of Appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 20th day of December, 1956.

[Seal]

R. DeMOTT,  
Clerk;

By /s/ THORA LUND,  
Deputy.

---

[Endorsed]: No. 15400. United States Court of Appeals for the Ninth Circuit. Robert Emmett Hoyt, Appellant, vs. General Insurance Company of America, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 22, 1956.

Docketed: December 31, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



United States Court of Appeals,  
Ninth Circuit

15400

ROBERT EMMETT HOYT,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Appellee.

STATEMENT OF POINTS

The points to be relied on by appellant are as follows:

(a) That plaintiff at the time of his employment with defendant was subject to and entitled to the benefits of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Sections 201 to 219;

(b) That the court's findings of fact are not supported by the evidence, but are contrary to the evidence, particularly findings of fact numbered II, III, IV, V, VI, VIII, IX and X.

Dated this 31st day of December, 1956.

ANDERSON, FRANKLIN  
& O'BRIEN,

By /s/ BEN ANDERSON,  
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 2, 1957.



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ROBERT EMMETT HOYT,  
*Appellant,*  
v.s

GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Appellee.*

---

**APPELLANT'S BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon.*

---

ANDERSON, FRANKLIN & O'BRIEN,  
BEN ANDERSON,  
333 American Bank Building,  
Portland 5, Oregon,  
*For Appellant.*

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY;  
WAYNE WILLIAMSON,  
1001 Board of Trade Building,  
Portland 4, Oregon,  
*For Appellee.*

---



## SUBJECT INDEX

	Page
Jurisdiction of the Court.....	1
Statement of Case.....	2
Appellant's Specification of Error.....	3
Argument .....	4
The Regulations .....	4
The Evidence .....	7

# TABLE OF AUTHORITIES

Page

## CASES

Durkin v. Joyce Agency, 110 F. Supp. 918 .....	8, 9
Heliwell v. Haberman, 140 F. 2d 833 .....	8
Mitchell v. Hartford Steam Boiler Inspection and Insurance Company, 12 Wage and Hour Cases 498 .....	12, 15
Tobin v. Johnson, 198 F. 2d 130 .....	8
Vives v. Serralles, 145 F. 2d 552 .....	9
Walling v. Belo, 316 U.S. 624 .....	12
Walling v. Halliburton Company, 331 U.S. 17 .....	12

## STATUTES

Fair Labor Standards Act of 1938 .....	4
29 U.S.C.A. 201-219 .....	1, 3, 16

## OTHER AUTHORITIES

United States Department of Labor, Wage and Hour Division, Administrator's Explanatory Bulletin (August 1953) Regulations Part 541 .....	9
--	---

NO. 15400

---

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ROBERT EMMETT HOYT,  
*Appellant,*  
v.s

GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Appellee.*

---

**APPELLANT'S BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon.*

---

**JURISDICTION OF THE COURT**

This action was brought by a boiler inspector seeking to recover overtime pay.

Jurisdiction of the United States District Court for the District of Oregon was invoked under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. A., paragraphs 201 to 219, inclusive).

The United States Court of Appeals has jurisdiction to review the judgment in question under U. S. C. A., title 28, sec. 1291.

The pleading necessary to show the existence of the jurisdiction appears on page 3 of the printed record.

## **STATEMENT OF CASE**

Appellant was employed by appellee as a boiler and machinery inspector from 1950 to May 15, 1955. His work was carried out in the States of Oregon and Washington (Tr. 28).

Appellee is an insurance company engaged in interstate commerce. Among its functions it insures steam boilers, pressure vessels and various types of mechanical devices in the various States (Tr. 12).

In the territory assigned to appellant he had from twelve to nineteen hundred units to inspect in Oregon and Washington (Tr. 28).

Appellee provided appellant with a car and travel expenses and during the time in question a salary of four hundred dollars per month (Tr. 29). Appellant arranged his own schedule of time, except that in emergencies and accidents he was on call (Tr. 29).

Appellee's chief inspector was located in Seattle, Washington. Appellant worked under the direction of appellee's supervisor, who maintained an office in Portland, Oregon (Tr. 28).



Inspections were made to determine the safe operation of the units involved and appellant made reports to his superiors on forms furnished by appellee (Tr. 30).

Appellee in its amended answer set up the following defenses:

(1) That appellant was an administrative employee within the meaning of the Fair Labor Standards Act of 1938.

(2) That appellant was a professional employee within the meaning of said Act, and was therefore exempt from its provisions.

(3) That appellant was not required to work more than 40 hours per week (Tr. 14).

The Court below held that appellant was an administrative and professional employee within the meaning of the Fair Labor Standards Act of 1938 and was not subject to the Act (Tr. 22).

### **APPELLANT'S SPECIFICATION OF ERROR**

The Court below erred in that the Court's Findings of Fact are not supported by the evidence, but are contrary to the evidence, particularly Findings of Fact numbered III, IV, V, VI, VIII, IX and X, and the Court erred in failing to hold that appellant at the time of his employment with appellee was subject to and entitled to the benefits of the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. A., Section 201 et seq.

## ARGUMENT

The particular question before the Court is whether appellant was exempt from the Fair Labor Standards Act under the provisions of Section 213 (a) (1) and (2), of the Act, which provides exemptions in certain types of employment.

The exemption section of the statute provides in part that the Act does not apply to:

“\* \* \* any employee employed in a bona fide executive, administrative, professional, or retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the administrator); \* \* \*”

## THE REGULATIONS

The regulations involved are as follows:

### “541.2 Administrative

The term ‘employee employed in a bona fide \* \* \* administrative \* \* \* capacity’ in section 13 (a) (1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer’s customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than \$75 per week (or \$200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

*Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section."

#### "541.3 Professional

The term 'employee employed in a bona fide \* \* \* professional \* \* \* capacity' in section 13 (a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of work:

(1) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Original and creative in character in a recognized field of artistic endeavor (as opposed to

work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than \$75 per week (or \$200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof;

*Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section."

## THE EVIDENCE

In determining whether employees are exempt under subsection (a) (1) of Section 213 as executive, administrative, or professional employees, each case must stand on its own facts.

The following is an abstract of the undisputed evidence relating to the nature of appellant's employment.

Appellant spent about 75 or 80 percent of his time on inspection. If he found serious defects he would telephone the home office. He had strict orders not to make any "on-the-spot condemnations" (Tr. 30, 31).

Appellant's training qualifying him as an inspector was as a marine engineer, a machinist apprentice. No technical schooling (Tr. 31). He went around for about two weeks with another inspector. He held a national card and a state inspector's license (Tr. 32).

The mechanics of inspecting a boiler was to check safety appliances, look for corrosion or deterioration. He was required to crawl into boilers and furnaces (Tr. 32). He used his employer's tools, such as hammer, flashlight, gauges, tape measure, and pump for hydrostatic tests. His work clothes were overalls. He worked irregular hours and his salary was \$400.00 per month (Tr. 32).

Appellee, at the time of trial, had 25 inspectors working under the supervision of its Seattle office, none of whom had a college degree in engineering. Very little training is required where an inspector comes from another company, "but if a man comes with no previous

training, it may take from 3 months to a year before the employer thinks that man is capable of accepting a territory" (Tr. 127-128).

The administrator has set up regulations defining the terms: executive employee, administrative employee and professional employee, and the courts have generally held that such regulations have the force and effect of law.

In the case of *Heliwell v. Haberman*, 140 F.2d 833, the Court said:

"Under the section exempting executive employees as defined and delimited by Wage and Hour Administrator, his regulations setting out in the conjunctive six conditions to constitute an executive employee have the force of law, and hence before an employee may be denied overtime payment as an executive the six conditions must be fulfilled."

In *Tobin v. Johnson*, 198 F.2d 130, the Court said:

"The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all able-bodied working men and women a fair day's pay for a fair day's work, and any exemption from such humanitarian and remedial legislation must be narrowly construed, giving due regard to plain meaning of statutory language and intent of Congress."

In *Durkin v. Joyce Agency*, 110 F. Supp. 918, the Court said:

"In determining whether employees are within the exemption provisions of Fair Labor Standards Act, courts may look to administrator's bulletins for guidance."

The United States Department of Labor, Wage and Hour Division, publishes periodical explanatory bulletins prepared by the administrator, which bulletins seek to explain the proper application of the regulations.

The courts have generally held that such explanatory bulletins are of value in determining whether workers are exempt.

In the case of *Vives v. Serralles*, 145 F.2d 552, the Court held that an interpretative bulletin promulgated by the administrator of the Wage and Hour Division, defining terms, is of value in determining whether workers are exempt, and in *Durkin v. Joyce*, 110 F. Supp. 918; 211 F.2d 241, the Court said:

“In determining whether employees are within exemption provisions of this chapter, courts may look to administrator’s bulletins for guidance.”

The following language is quoted from the administrator’s explanatory bulletins, defining the terms executive, administrative and professional, as contained in Section 13 (a) (1) of the Fair Labor Standards Act of 1938, said bulletin issued and dated August, 1953:

Administrator’s Explanatory Bulletin  
(August 1953),

Regulations Part 541, page 12:

“DISCRETION AND INDEPENDENT  
JUDGMENT

(c) DISTINGUISHED FROM SKILLS AND  
PROCEDURES.

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of the regulations. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specified standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations."



Administrator's Explanatory Bulletin  
(August 1953),

Regulations Part 541, page 11:

"(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be 'directly related to management policies or general business operations' as that phrase is used in the regulations."

Administrator's Explanatory Bulletin  
(August 1953),

Regulations Part 541, page 16:

"(a) The 'learned' professions are described in the regulations (par. 541.3 (a) (1)) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

"(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high-school level.

“(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

“(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word “customarily” has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience.”

In the following cases, boiler and machinery inspectors have been held to come within the terms of the Fair Labor Standards Act unless excluded by a “Belo” type of contract that was drawn into controversy in *Walling v. Belo*, 316 U. S. 624, which was decided in 1942.

Such contracts have received further sanction by the 1949 amendment to the Fair Labor Standards Act of 1938, Sec. 7 (e) which provides for certain conditions under which an employee may work in excess of 40 hours and be exempt by reason of contract.

No exemption is claimed under such contract in the case at bar.

In the case of *Walling v. Halliburton Company*, 331 U. S. 17, plaintiff was engaged in testing and servicing oil wells, and was held to be under the act except exempt under a “Belo” type contract.

In *Mitchell v. Hartford Steam Boiler Inspection and Insurance Company*, 12 Wages and Hour Cases 498;

United States District Court, District of Connecticut; 28 C.C.H. Labor Cases, Case 69192, the court dealt with a boiler inspector's claim. The court made the following findings of fact:

"1. Plaintiff is Secretary of Labor of the United States.

2. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Connecticut, having its principal office and place of business at 56 Prospect Street in the City of Hartford, Hartford County, State of Connecticut, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business and elsewhere in the casualty insurance business.

3. Defendant is engaged in interstate commerce within the meaning of the Fair Labor Standards Act.

4. Approximately 600 of the field employees of defendant, known as inspectors, are employed under guaranteed wage contracts purporting to establish an hourly rate of pay for the first 40 hours in each work week, with time and one half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked.

5. The nature of the employment of the inspectors necessitates the irregular hours of work per week, typically fluctuating between 35 and 50 hours, and exceeding 60 hours in not more than  $\frac{1}{4}$  of 1% of the weeks worked.

6. The form of contract adopted was intended to continue the weekly wage method of payment in effect for inspectors prior to the adoption of the Fair Labor Standards Act.

7. The hours of employment per week were ex-

pected to fluctuate, but to be kept below 60 hours in all but the most exceptional cases.

8. It is the practice of defendant to assign to each inspector a territory within the area of a branch office, within which territory are located approximately 1200 insured objects for the inspection of which the inspector is responsible.

9. In each branch office the inspection service is headed by a chief inspector, under whom work supervising inspectors in sufficient number to provide one for each four to eight field inspectors.

10. Each field inspector arranges his own schedule of inspections, averaging about 1500 object inspections a year.

11. The objects insured and inspected are steam boilers, pressure vessels, and machinery of various types.

12. The inspectors are charged with determining in the first instance the suitability of the objects for insurance and thereafter their suitability for continued safe operation.

13. A detailed daily report on forms furnished by defendant of the condition of each object inspected is sent by the inspector to the branch office, where it is reviewed by the supervising inspector, edited, typed and reported to the assured.

14. More than 20% of the time of each inspector is spent in the physical inspection of insured objects.

15. If defective or unsafe conditions are found, the inspector's duty is to report them both to the insured and defendant, and to arrange with the assured for their correction, with power if necessary to suspend the risk immediately if the assured declines to discontinue unsafe operation.

16. The power of suspension is occasionally, although quite rarely, used by the inspectors.

17. A majority of the field inspectors are recruited from marine engineers, with experience in boiler operation. A minority have had college or technical school education. A typical field inspector has had a high school education, with three to five years practical experience in boiler or electrical machinery operation.

18. On original hiring, each inspector is given a short training course of one or more weeks of theoretical instruction, followed by one to three months or more experience with an inspector in the field, supplemented thereafter by bulletins and house organ articles."

It appearing that the inspector was working under a "Belo" type of contract the Court made the following conclusions of law:

"1. The Court has jurisdiction of the parties and subject matter of the action.

2. The field inspectors of the defendant are not exempt from coverage of the Fair Labor Standards Act as administrative employees.

3. Employment and payment of the field inspectors by the defendant under its present form of guaranteed weekly wage contract is in conformity with Section 7 (e) of the Fair Labor Standards Act as amended and is not in violation of any provision of the Act.

4. Defendant is entitled to judgment dismissing the action."

Except as to the "Belo" type of contract, we submit there is no distinction between *Mitchell v. Hartford* and the case at bar.

A number of cases and explanatory matter dealing with exemptions under the Fair Labor Standards Act of

1938, appear in an annotation in 40 A.L.R. 2nd, page 332.

We submit that appellant does not come under the exemption provisions of the Fair Labor Standards Act of 1938 as amended.

Respectfully submitted,

ANDERSON, FRANKLIN & O'BRIEN,

By BEN ANDERSON,  
Attorneys for Appellant.

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ROBERT EMMETT HOYT,  
*Appellant,*  
vs.

GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Appellee.*

---

**APPELLEE'S BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon.*

---

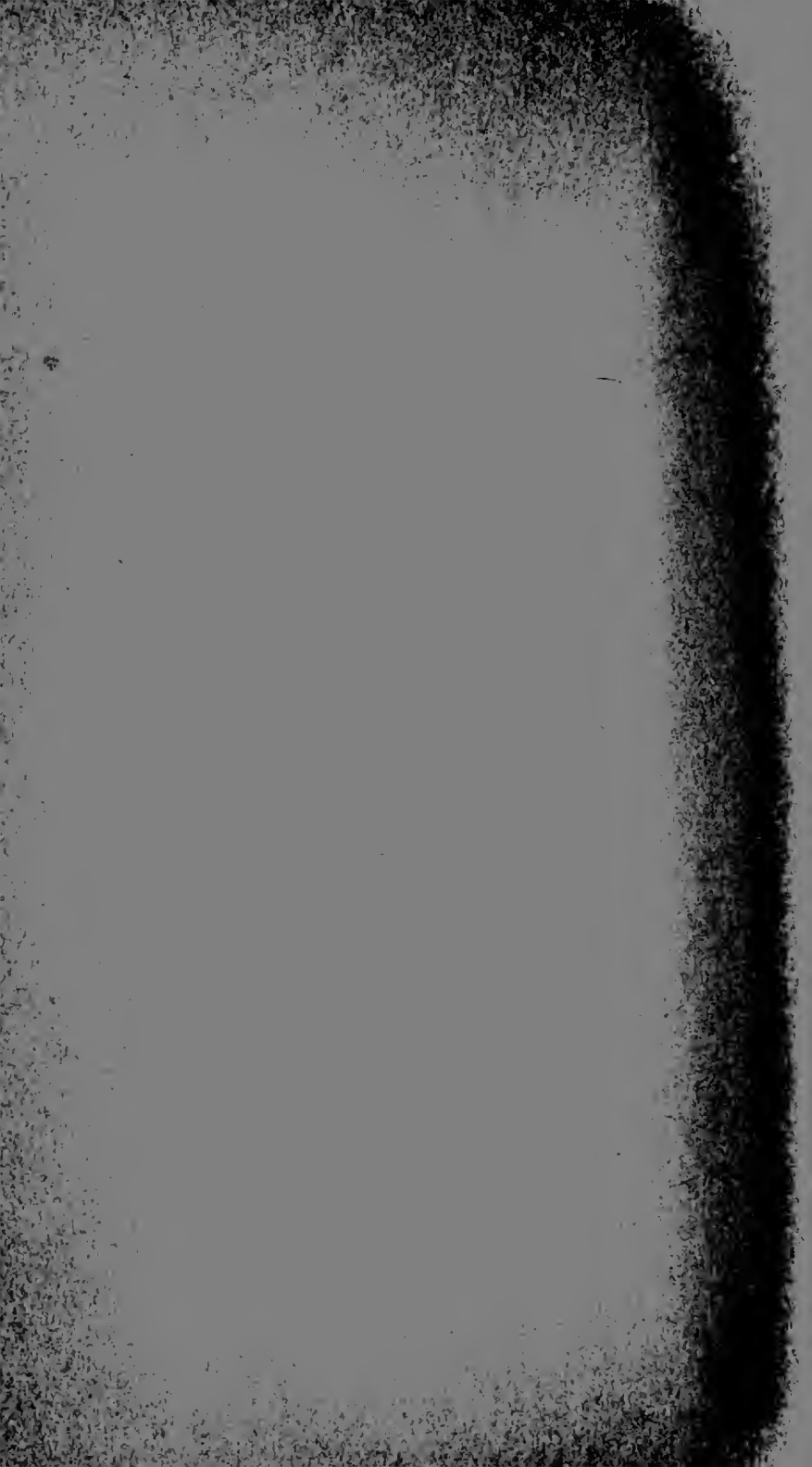
ANDERSON, FRANKLIN & O'BRIEN,  
BEN ANDERSON,  
333 American Bank Building,  
Portland 5, Oregon,  
*For Appellant.*

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY;  
WAYNE A. WILLIAMSON,  
1001 Board of Trade Building,  
Portland 4, Oregon,  
*For Appellee.*

---

FILED

APR 17 1957





## INDEX

	Page
Statement of the Case.....	1
Summary of Argument.....	2
Argument .....	3
Conclusion .....	17

# INDEX OF AUTHORITIES

	Page
Anderson v. Federal Cartridge Corp., 62 F. Supp. 775, 783; affd. 156 F. (2d) 681.....	15
Ashworth v. E. B. Badger & Sons Co., 63 F. Supp. 710.....	9
Atlantic Co. v. Weaver, 150 F. (2d) 843.....	6
Baker v. California Shipbuilding Corporation, 73 F. Supp. 322 .....	12
Conary v. A.O.G. Corp., 20 CCH Lab. Cas. 66,353....	13
Distelhorse v. Day and Zimmerman, 58 F. Supp. 334.....	11
Dumas, et al v. King, 157 F. (2d) 463.....	6
Kerew v. Emerson Radio and Photograph Co., 76 F. Supp. 197 .....	13
Mitchel v. Harford Steamboiler Inspection and Insurance Co., 28 CCH Lab. Cas. 69,192; 30 CCH Lab. Cas. 70,135; 235 F. (2d) 942.....	2, 14
Smith v. American Transit Lines, Inc., 163 F. (2d) 1014.....	6
Walling v. Armour & Co., 13 CCH Lab. Cas. 63,883 ..	13
Walling v. General Industries Co., 155 F. (2d) 711, affd. 67 S. Ct. 883.....	5
Walling v. Moore Milling Co., 62 F. Supp. 378.....	5
Wells v. Radio Corporation of America, 77 F. Supp. 964 .....	12-13
<hr/>	
29 U.S.C.A., secs. 201-219.....	1

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

ROBERT EMMETT HOYT,  
*Appellant,*  
vs.

GENERAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
*Appellee.*

---

**APPELLEE'S BRIEF**

---

*Appeal from the United States District Court for the  
District of Oregon.*

---

**STATEMENT OF CASE**

This is an appeal from a judgment rendered by Chief Judge Claude McColloch in favor of the appellee, an insurance company, which was sued by appellant, a former employee, to recover alleged unpaid overtime compensation under the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A., secs. 201-219.

The questions presented to the trial court were, first, whether the appellant's employment fell within the ex-

emption provisions of the Act and, secondly, whether appellant in fact performed overtime work. The trial court held that appellant was in an exempt employment (Tr. 22) and accordingly did not determine the second question.

The appellee is engaged in the general insurance business. Appellant was employed by appellee as a boiler and machinery inspector making inspections in the states of Oregon and Washington.

## **ARGUMENT**

### **Summary of Argument**

(1.) Appellant was employed by appellee as an administrative employee.

(2.) In making the determination as to whether appellant was employed as an administrative employee, the Court must look to the actual work performed. The title given the employment is of little assistance in making this determination.

(3.) The question involved is simply one of fact and the trial court's findings will not be disturbed unless clearly wrong.

(4.) The evidence amply supports the findings of the trial judge.

(5.) The authorities support the finding that appellant was employed as an administrative employee.

(6.) The case of *Mitchell v. Hartford Steamboiler Inspection and Insurance Co.*, *infra*, is not in point in the case at bar.

(7.) Appellee has followed the instructions of a labor board representative in classifying appellant as an administrative employee and engaged in exempt employment.

## ARGUMENT

Appellant correctly states on page 4 of his brief that in the court below appellee contended that the work appellant performed was exempt both as an administrative and as a professional employee. However, the court below did not make a finding to the effect that appellant's primary duty consisted of the performance of work of an advanced type in a field of science or learning customarily acquired by prolonged courses of specialized intellectual instruction and study as required under subdivision (a) of Regulation 541.3 relating to professional employees. Accordingly, appellee does not feel that it can properly advance the contention in this court that appellant was employed as a professional employee.

Therefore, on this appeal appellee will contend only that at the time in question appellant was engaged in exempt work within the meaning of Regulation 541.2 as an administrative employee.

This Regulation provides as follows:

### "541.2 Administrative

The term 'employee employed in a bona fide \* \* \* administrative \* \* \* capacity' in section 13 (a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly

related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than \$75 per week (or \$200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

*Provided*, That an employee who is compensated on a salary or fee basis at the rate of not less than \$100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section."

In determining whether or not an employee is exempt under the provisions of the law now under con-

sideration, the tryer of the facts must look to the duties performed by the employee. The title given to an employee or the designation of his employment is of little assistance. *Walling v. General Industries Co.*, 155 F. (2d) 711, Affirmed 67 S. Ct. 883. *Walling v. Moore Milling Co.*, 62 F. Supp. 378.

It is, therefore, of little assistance to the Court to know that the appellant was employed as a "boiler and machinery inspector" (Tr. 12). To determine whether or not appellant was engaged in an exempt employment, the Court must first determine what work appellant, in fact, performed for appellee.

Appellee submits that this determination is simply one of fact. The trial judge found that appellant's primary duty consisted of the performance of office or non-manual field work directly related to management policies or general business operations of the appellee or appellee's customers; that appellant customarily and regularly exercised discretion and independent judgment; that appellant performed his work under only general supervision and along specialized and technical lines requiring special training, experience and knowledge and that appellant executed special assignments and tasks under only general supervision (Tr. 20-22).

Appellant overlooks these facts in setting forth his contentions as to the evidence (App. Br. 7). However, these findings were amply supported by the testimony in the record.

It is, of course, well settled that in actions under the Fair Labor Standards Act, the same as in other cases,

the findings of the Judge below are binding upon appeal unless it can be said that they are clearly wrong. Rule 52 (a) of the Rules of Civil Procedure 28 U.S.C.A. following section 723 (c). An appellate court will not weigh the evidence or retry the issues of fact and substitute its judgment for that of the trial court. *Smith v. American Transit Lines, Inc.*, 163 F. (2d) 1014. *Atlantic Co. v. Weaver*, 150 F. (2d) 843. *Dumas, et al v. King*, 157 F. (2d) 463.

As the questions involved are largely fact questions, appellee submits that this appeal should be resolved on the basis of the above rule. However, in support of the trial court's findings, appellee will, at this point in its brief, discuss the evidence upon which the trial judge based his findings.

In order to obtain the position appellant held with appellee at the time in question, appellant was first required to secure a state license (Tr. 37). Before a license could be obtained appellant had to pass a two-day examination conducted by state examiners (Tr. 37). To be eligible for the examination an applicant had to be over twenty-one years of age (Tr. 37) and have either three years actual experience or an engineering degree plus two years actual experience (Tr. 37).

Appellant in addition to the above qualifications had been employed for over twenty years as a marine engineer (Tr. 39), had taken a two-years' correspondence course in refrigeration (Tr. 39), and had studied for approximately four years a correspondence course of the Coast Guard (Tr. 40).



Appellant as an employee of appellee was qualified to inspect all kinds of machinery of every description. This included not only factory machinery but such complicated devices as elevators, pressure vessels, boilers, electrical motors, etc. (Tr. 42-43). Appellant was qualified to and did enter large sawmills, paper mills, and similar establishments and inspect for safety all of the machinery used therein (Tr. 42).

In making these inspections, appellant was skilled in the use of and knew how to interpret various testing devices and instruments such as strain gauges (Tr. 43), tachometers (Tr. 44), vibrometers (Tr. 44), megohmeters (Tr. 44), volt and amp meters (Tr. 44), etc.

Although appellant on occasions used a hammer, this was not for purposes of doing repair or similar type work but was used to tap with so as to make a sound as a testing device (Tr. 43).

Appellant was not required to do physical (Tr. 48) or manual labor (Tr. 49). The physical labor connected with preparing the boilers, pressure vessels, and other objects for inspection was done by employees of the various assureds in advance of appellant's arrival (Tr. 48).

Appellant worked irregular hours and arranged his own schedule (Tr. 29). He was given a geographical territory to service and it was his responsibility to organize this territory and plan his work as he saw fit (Tr. 109, 52).

It was appellant's duty when he first called on an assured to consult with management. On a first inspec-

tion, before actually looking at the machinery, he had to make a general overall evaluation of the plant (Tr. 53). He had to size up and evaluate the personnel available and judge their ability to properly operate the machines (Tr. 111). He had to inspect and evaluate the repair facilities and the maintenance program (Tr. 53). One of his principal responsibilities was to give instruction and advice and make recommendations concerning loss prevention (Tr. 54, 110). This encompassed not only changes in mechanical structure but personnel training as well (Tr. 110).

If the plant was deficient in some way in its maintenance program, repair facilities, training program, or other respect, appellant would make recommendations and suggestions for improvement (Tr. 54).

The inspections that appellant made included making inspections for the State of Oregon and submitting reports to the State (Tr. 55, 59).

Appellant's recommendations were sent to the insured. The great majority of the time appellant dealt directly with the insured in seeing that his recommendations were carried into effect. The appellant and not the Home Office followed up on these recommendations (Tr. 112).

If there was resistance or if the recommendations were not complied with, appellant was required to use diplomacy in his dealings with the assured (Tr. 61).

The appellant was sometimes required to consult with the agents and solicit their aid in carrying out his recommendations (Tr. 111). In addition he also made

underwriting recommendations (Tr. 110) and recommendations concerning agency and policy problems (Tr. 111). He was familiar with rates and would sometimes give the agents advice concerning rates (Tr. 65).

At the time in question there were six engineer inspectors for the entire State of Oregon (Tr. 87). When appellant first went to work for appellee, all of the inspectors were on the same level authoritywise (Tr. 88). Their immediate superior in Oregon was Mr. Bogardus, who had no knowledge or skill in engineering but acted only in the capacity of administrative head (Tr. 87).

The appellant did not operate under and was independent of direct supervision (Tr. 109). To a very large degree he depended on his own judgment and discretion in making decisions.

It can thus be seen that appellant was constantly required to exercise independent judgment and discretion and that he worked only under general supervision in specialized and technical lines requiring training, experience and knowledge.

As previously pointed out, the title given an employee or the designation of his employment is of little assistance in determining whether or not he is an administrative employee within the meaning of the exemption statute. The Courts have, however, on a number of occasions, dealt with the problem of whether or not inspectors of various kinds were exempt under the law now under consideration.

For example, in the case of *Ashworth v. E. B. Badger & Sons Co.*, 63 F. Supp. 710, it was held that a field

inspector-expediter was exempt under the regulation under consideration.

The employer in this case was engaged in the business of production, engineering and installation of equipment for oil refining plants, chemical plants, and power plants. Defendant had contracts with corporations and furnished plans for and parts of refining and power plants. To fill these contracts, subcontracts were made with other manufacturers. The other manufacturers fabricated the pipe and manufactured the component parts of the refining and power plants in question and it was with this portion of the defendant's work that the plaintiff was employed. To each plant an inspector-expediter was sent to represent the defendant and follow the order through its different stages of production to determine if plans and specifications were properly met. It also was the duty of this individual to try and speed up the job if it fell behind schedule. The Court held:

"That the plaintiff's work was along specialized lines requiring special training, experience or knowledge can hardly be doubted. It may be noted that the Regulation does not demand that the work be along both specialized *and* technical lines. Although it would not be conclusive that the defendant itself regarded that the work required special training or experience, yet it is of considerable importance that the defendant required a substantial amount of specialized training before employing the plaintiff to perform the work involved, and there is no doubt the plaintiff had such training. The very nature of the work involved, as outlined above, indicates clearly the plaintiff's work was along specialized lines since it undoubtedly required special training, \* \* \*

“ \* \* \* Giving the words of the Regulation their natural meaning, an employee possessing the authority to make decisions on his own account without direction or instruction from others may be said to exercise ‘discretion and independent judgment.’ Under this test the plaintiff here undoubtedly performed work which required or involved the exercise of discretion and independent judgment.  
\* \* \*”

“The contention of the plaintiff that his work was merely mechanical is not tenable. It was far more than mechanical; it involved, as stated above, the necessity to make decisions; it was administrative within the meaning of the Regulation. Employees serving in the plaintiff’s capacity are more or less on their own in the field, doing important work for the purpose of enabling the defendant’s business to function.

“The unsupported testimony of the plaintiff that he performed manual labor at times does not aid him. True, he performed some manual labor that was incident to his work but this court cannot find he performed the manual labor he stated he performed at the Bent and Hayward Street Shops of the defendant. Whatever work he was required to do at these shops involved the performance of the same duties he did in the field. It is of no moment he was not always busy with those duties at those shops in the last days of his employment with the defendant and he volunteered to do some manual work. Further, this court cannot find as a fact the plaintiff lifted heavy plates weighing up to 100 pounds at the Bent Street Shop. If he did, he did so on his own account since there were union employees at that shop to perform this work. His work did not require it. The plaintiff’s work was essentially nonmanual in every sense of the word.”

In the case of *Distelhorse v. Day and Zimmerman*, 58 F. Supp. 334, the Court held that an assistant safety

engineer was employed as an administrative employee. The Court held that he regularly and directly assisted the chief safety engineer in nonmanual work requiring the exercise of discretion and independent judgment.

In the case of *Baker v. California Shipbuilding Corporation*, 73 F. Supp. 322, the Court dealt with employees in several different categories. It was held, for example, that an employee who was an inspector in the steel shop but whose work merely required him to determine the quality of the material and its confirmation to specifications and whose duties were routine and involved little authority was covered by the Act. On the other hand, however, safety inspectors were held to be exempt. These latter employees were given a particular section of the plant to supervise and ascertain the safety conditions and methods under which the men worked. These men had no authority to order compliance with their recommendations, but their duties were nonmanual field work held to directly relate to management policies and general business operations and that required experience, discretion and independent judgment. They conducted conferences with leadmen and foremen relating to safety measures and preventable methods to avoid accidents. A supervisor and inspector in the engineering and inspection departments was also held to be an administrative employee.

Appellee submits that the appellant in the case at bar had considerably more independence and responsibility than did the inspectors in the *Baker* case.

See also *Wells v. Radio Corporation of America*, 77

F. Supp. 964, where Judge Medina had occasion to consider process engineers, manufacturing development engineers, time study engineers, cost estimators, problem analysts, foremen and assistant foremen. In all of these cases, it was held that the employees were exempt under the Wage and Hour Law.

In *Walling v. Armour & Co.*, 13 CCH Lab. Cas. 63,883, the Court held that a car-route beef selector whose duties involved assisting executive employees was engaged in an administrative capacity as was a time-keeper.

In *Kerew v. Emerson Radio and Phonograph Co.*, 76 F. Supp. 197, the Court held that an employee who had been engaged in the engineering department and who performed manual labor as a highly skilled mechanic was not exempt, but that when he was assigned as a fuel inspector with duties that involved independent judgment, he was exempt. As an employee of the latter class, he spot-checked, used gauges and was even engaged in some repair work, although this did not occupy very much of his time.

In *Conary v. A.O.G. Corp.*, 20 CCH Lab. Cas. 66,353, field auditors, field materials men and inspectors were held to be exempt. These employees were required to read blueprints and engineering specifications; have knowledge of measuring instruments, gauges, etc., and know the use thereof; they were required to have knowledge of manuals and guides to follow as standards; they worked in the field and were under only general supervision.

Appellee relies heavily on the case of *Mitchell v. Hartford Steamboiler Inspection and Insurance Co.*, 28 CCH Lab. Cas. 69,192; 30 CCH Lab. Cas. 70,135; 235 F. (2d) 942. Appellee submits that this case is not an authority in support of appellant's position either on the facts or on the law announced therein.

In the Hartford case, *supra*, the plaintiff was the Secretary of Labor and brought the action apparently for the purpose of determining the validity of the labor contracts that the insurance company had entered into with its inspectors. The Court held in favor of the insurance company ruling that the contracts were valid. It is suggested that perhaps for this reason the Court did not feel it necessary to discuss or cite cases such as those already considered herein, when it discussed the administrative employee's exemption.

Even under the facts in that case, however, the Court did find that the inspectors customarily and regularly exercised discretion and independent judgment and that the inspectors performed their work under only generalized supervision and along specialized or technical lines requiring special training, experience and knowledge. However, the Court apparently did not classify the work as "nonmanual field work."

Irrespective of what kind of work the Court may have felt the Hartford inspectors were engaged in under the facts of that case, it is definitely clear under the facts in the case at bar that appellant was not engaged in "manual labor." In this case appellant worked in the field and by his own testimony was engaged in non-manual work.



Even if appellant had occasionally performed some mechanical operations in connection with his work, this would not put him in a nonexempt category. *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775, 783; Aff'd. 156 F. (2d) 681.

Furthermore, the record in the case at bar shows clearly that the work performed by the Hartford inspectors materially differs from the work performed by appellee's inspectors. It so happened that the witness McIntyre had previously been employed by the Hartford Steamboiler Inspection and Insurance Company (Tr. 117) and was intimately familiar with their procedures (Tr. 118). Mr. McIntyre explained that appellee's inspectors, as distinguished from those employed by the Hartford and some other companies, were expected to handle more complicated inspection work; that they did sales work of a limited degree; that they were much more independent and operated with much less supervision and direction (Tr. 120). Mr. McIntyre explained that appellee's inspectors had to make evaluations from the standpoint of an independent engineer and that this was not true of the Hartford inspectors (Tr. 124).

As pointed out in the Hartford case, *supra*, the Hartford inspectors worked under very close supervision by their superiors. They were required to fill out daily forms which were detailed and which were in turn reviewed by supervising inspectors before being sent to the insured. In the case at bar, as already pointed out, the inspector's recommendations were sent directly to

the assured without changes being made and without being passed on by a superior.

Also in the Hartford case, there was a supervising inspector having under his authority a small group of field inspectors. This was not true of appellee's operation.

It is clear from this testimony that appellee's inspectors exercised a great deal more independence and worked in the field under far less supervision than did the Hartford inspectors. Appellee submits that the cases it has previously cited herein are much more persuasive in its favor than is the Hartford case in appellant's favor.

Appellant cites the Administrator's Explanatory Bulletin (App. Br. 9-12) in support of his contentions. The Bulletin, appellee submits, is no more helpful than the regulation as it deals only in generalities. To see if the regulation is applicable, the facts involved in *this* case must be considered. It is significant that a labor board representative reviewed appellee's methods of handling its inspectors in 1953 and instructed appellee that inspectors in appellant's category were engaged in exempt work (Tr. 95). Appellee in considering appellant in an exempt group was simply following the labor board representative's instructions.

## CONCLUSION

The decision in this case depends upon the determination of fact questions concerning appellant's employment. If, in fact, appellant performed work of the kind and description set forth in the regulation under consideration, he was in an exempt category. The trial judge found, as a matter of fact, that his work was exempt from the Wage and Hour Law. These findings are binding unless clearly erroneous.

Moreover, the record, including the testimony of appellant himself, clearly preponderates in favor of the appellant being classed as an administrative employee. Many decisions have held employees doing similar work but with far less independence and responsibility than appellant were exempt as administrative employees.

The trial court's findings and judgment to that effect should be affirmed.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, DENECKE  
& KINSEY,  
and WAYNE A. WILLIAMSON,  
For Appellee.



No. 15402

---

IN THE

**United States**

**Court of Appeals**

FOR THE NINTH CIRCUIT

---

RICHARD WILLIAM BOWLER,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee*

---

BRIEF FOR APPELLEE

---

*Appeal from a Judgment of the United States  
District Court for the Eastern District  
of Washington, Northern Division*

---

FILED

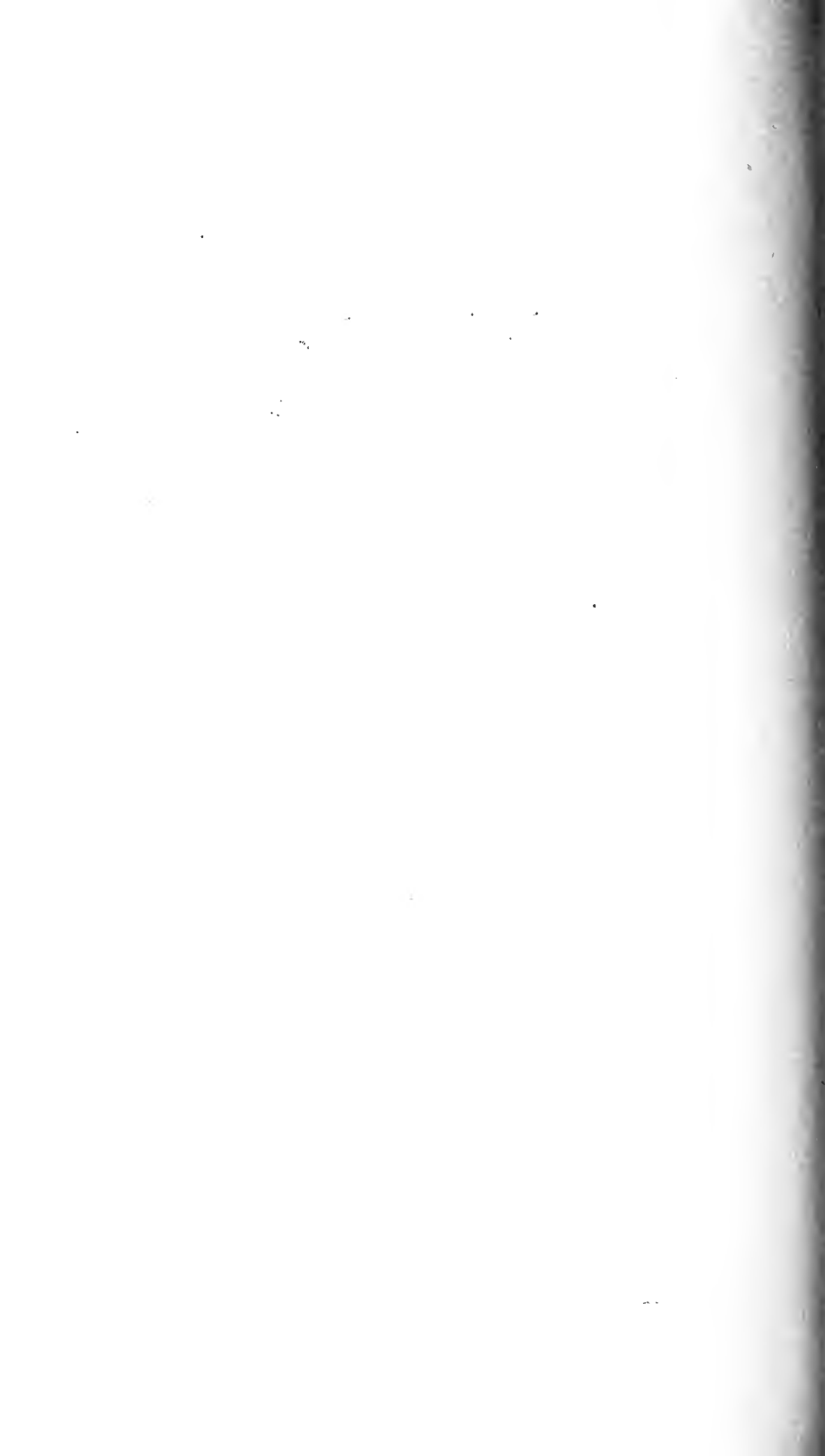
MAY 29 1957

L. P. O'BRIEN, CLERK

WILLIAM B. BANTZ,  
*United States Attorney.*

RINER E. DEGLOW,  
*Assistant U. S. Attorney.*

---



## INDEX

	Page
Jurisdiction -----	1
Statute -----	2
Additional Statement of Facts-----	3
Additional Statement of the Case-----	3
The Evidence-----	7
A. Representations Regarding the Financial Condition of the Company and Dividends---	7
B. Representations Regarding Market Price and Listing of Stock on the Stock Exchange--	17
C. Proceeds from Sale of Stock Going to Corporation-----	20
D. Representations Concerning Agreements to Repurchase Stock-----	23
E. Use of Mails in Counts I and III-----	28
F. Other Evidence-----	30
Questions Involved-----	30
Summary of Argument-----	31

INDEX (Continued)

	Page
Argument -----	34
The Evidence Overwhelmingly Establishes The Use of the Mails in a Scheme to Defraud in the Sale of Securities and the Trial Court Properly Denied the Appellant's Motion for Acquittal----	34
Conclusion -----	42



## CITATIONS

	Page
<i>U. S. v. Monjar</i> (D.C. Del.) 47 F. Supp 421; aff. 14 F. 2d 916, c. d. 325 U. S. 859-----	20
<i>Elwert v. U. S.</i> , 231 F. 2d 928, 933 (C.A. 9, 1956)-----	34, 39, 40
<i>Glasser v. U.S.</i> , 315 U. S. 60, 80 (1942)-----	35
<i>Schino v. U. S.</i> , 209 F. 2d 67, 72 (C.A. 9, 1954)--	35, 39
<i>Woodard Laboratories v. U. S.</i> , 198 F. 2d 995, 998 (C.A. 9, 1952)-----	35
<i>McCoy v. U. S.</i> , 169 F. 2d 776, 783 (C.A. 9, 1948), cert. denied, 335, U. S. 898 (1948)-----	35, 39
<i>Suetter v. U. S.</i> , 140 F. 2d 103, 107 (C.A. 9, 1944)--	35
<i>Foshay v. U. S.</i> , 68 F. 2d 205, 210 (C.A. 8, 1933), cert. denied 291 U. S. 674-----	36
<i>U. S. v. Gasomiser Corp.</i> , 7 F.R.D. 712 (D. Del., 1947)-----	37
<i>Stoppelli v. U. S.</i> , 183 F. 2d 391, 393 (C.A. 9, 1950)-----	37
<i>Curley v. U. S.</i> , 81 U. S. App. D.C. 229, 160 F. 2d 229, 230-----	37, 38

## CITATIONS (Continued)

	Page
<i>Charles v. U. S.</i> , 215 F. 2d 831 (C.A. 9, 1954)-----	39
<i>Penosi v. U. S.</i> , 206 F. 2d 529, 530 (C.A. 9, 1953)-----	39, 41
<i>Remmer v. U. S.</i> , 205 F. 2d 277, 287 (C.A. 9, 1953)-----	39, 40
<i>Horman v. U. S.</i> , 116 Fed 350, 352 (C.A. 6, 1902)--	40
<i>Dittman v. U. S.</i> , 224 Fed. 819, 823-824 (C.A. 6, 1915)-----	40
<i>Holland v. U. S.</i> , 348 U. S. 121, 139-140 (1954)----	41

## STATUTES INVOLVED

15 U. S. Code, Section 77q-----	2, 3
Revised Code of Washington 23.24.020-----	9
Revised Code of Washington 23.24.030-----	9

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

RICHARD WILLIAM BOWLER,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee*

---

BRIEF FOR APPELLEE

---

*Appeal from a Judgment of the United States  
District Court for the Eastern District  
of Washington, Northern Division*

---

JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

## STATUTE INVOLVED

## 15 U.S. Code, Section 77q:

*“Fraudulent interstate transactions* (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the mails, to publish, give publicity to or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section. May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84.”

## ADDITIONAL STATEMENT OF FACTS

In order that the questions involved may be better pointed out, an additional statement of the case will be summarized.

## ADDITIONAL STATEMENT OF CASE

Defendant, Richard William Bowler, was convicted on two counts of violating Section 17(a) of the Securities Act of 1933 (Sec. 77q(a) Title 15, U.S.C.). He was charged with devising a scheme to defraud purchasers of the common stock of Spokane Warehouse & Storage Co. by selling this stock by misrepresentations and by concealment of material facts. Defendant was charged with employing this scheme to defraud in the sale of securities and using the mails in so doing.

It was charged that defendant's scheme to defraud embodied the following misrepresentations:

That Spokane Warehouse & Storage Co. was in sound financial condition and operating at a profit; that dividends had been paid on its common stock; that based on successful operation and profits dividends would be paid; that the stock had a market value in excess of ten cents a share (the selling price) and this market value would soon increase substantially; that the stock would soon be listed on

a stock exchange and traded at a price substantially over the existing selling price; that a purchaser could get his money back from defendant; that the stock was company stock and the proceeds from stock sales would go to the corporation and be used for improvements to increase earnings; and that there was only a limited amount of stock for sale.

The material omissions charged were that defendant concealed from purchasers the following facts:

That there existed \$350,000 in outstanding first mortgage 6% bonds; that the corporation was in default on interest payments due on these bonds; that the corporation had never operated at a profit but during each year of its operation had accumulated earned surplus deficits amounting to over \$100,000 by September 30, 1954; that no dividends on the stock could be paid until this deficit was eliminated; and that defendant was selling his personally-owned stock for his own benefit and not stock for the benefit of the company.

Defendant Bowler was one of the original promoters of Spokane Warehouse & Storage Co., which operates a parking garage and a storage warehouse in Spokane, Washington. (R. 686-693) Bowler had financed the corporation by selling \$350,000 in 6% First Mortgage bonds between December 1950 and July 31, 1953. (R. 211, 234) For his promotional ser-

vices and for assigning a lease on the land and a purchase contract on the building he had received 1,180,000 shares of the corporation's common stock having a par value of ten cents a share. (R. 209) Bowler gave over 300,000 shares to his associate promoters and others (R. 832-841) and donated 380,000 shares to the corporation for distribution as a bonus to the bond purchasers. (R. 208—P. Ex. 34A) This left Bowler, holding 447,000 shares (R. 842), the corporation's largest stockholder. (R. 842).

This case involves the sale of the common stock held by Bowler. In September 1953, when the corporation was confronted with the serious problem of how to meet its bond interest due December 31, 1953, Bowler offered to take an option to purchase 118,850 shares of stock to net the corporation  $71\frac{1}{2}c$  per share. (R. 229, 544, Ex. 34B) In the fall of 1953 Bowler began to sell his personally owned stock at 10c a share and in January 1954 gave the company \$8,850 to pay for 118,000 shares at  $71\frac{1}{2}c$  a share, this amount of stock being then issued to Bowler. (R. 229-231) This \$8,850 was used by the corporation in making a partial bond interest payment of 3%. (R. 310).

Although after January 12, 1954 the company received no more money for stock, (R. 234) Bowler continued to sell his own personal stock for his own profit. By January 1955 he had disposed of a total of

469,000 shares, nearly all at 10c a share. (R. 836) The jury's verdict sustained the charge that he employed a scheme to defraud in selling this stock by means of misrepresentations and by concealing material facts chiefly relating to the poor financial condition of this corporation.

In the light of Bowler's sales talks, the results of operations of this corporation both before and during the period of Bowler's stock sales are important. Bowler had acted as manager for the corporation during the first period of operations, but discontinued this activity early in 1953. (R. 577) The company never operated at a profit and an earned surplus deficit of \$52,970.55 on September 30, 1952, had increased to \$108,399.41 by September 30, 1955 (R. 222), of which \$24,439 was delinquent bond interest due as of December 31, 1954. (R. 226) This continued operational loss was well known to Bowler as a promoter, as a manager during a part of the period, and as a stockholder receiving financial statements prepared by the corporation's accountants. (R. 218, 847-849, 851) In addition, during the period Bowler was selling his stock he frequently obtained current financial information from the corporation's accountants, records, and officers. (R. 228-233, R. 218, 847-849, 851, 870) At all times his office was in the corporation's warehouse building adjacent to the parking garage. (R. 116).



## THE EVIDENCE

Thirteen investor witnesses testified at the trial for the Government and, although their testimony indicated that Bowler varied his sales talk somewhat, the same basic misrepresentations in one form or another were made to all of these investors. However, in spite of the fact that witness after witness testified as to these specific misrepresentations which are now being discussed, Bowler denied making any of the misrepresentations, and in this respect there exists a direct conflict between the testimony of appellant Bowler and the testimony of these investors, most of whom were farmers residing in various sections of eastern Washington. The verdict of the jury has, of course, resolved that conflict against Bowler.

*A. Representations Regarding the Financial Condition of the Company and Dividends*

John D. Schoedel, a Certified Public Accountant, who has been secretary and treasurer of the corporation since December 31, 1954 (R. 193-195) and a partner in the accounting firm of Schoedel and Elder, which does bookkeeping and accounting work for the corporation, testified concerning the corporation's financial condition. Exhibits 39 and 40 contain detailed figures of the corporation's operations from its inception until the end of February 1956, about two months before the trial of this case. These include

periodic profit and loss statements and balance sheets. An examination of these records discloses that at no time has this corporation operated at a profit.

The losses were as follows for each year ending on September 30: (R. 220-221)

1952—\$52,970.55

1953— 37,741.03

1954— 14,361.20

1955— 8,234.30

As heretofore pointed out, the earned surplus deficit increased each year: (R. 222)

1952—\$ 52,970.00

1953— 85,794.91

1954— 100,156.11

1955— 108,399.41

During these years the company had outstanding \$350,000 in first mortgage bonds due December 31, 1960, bearing six per cent interest which amounted to a yearly obligation of \$21,000.00. (R. 223) The corporation paid only three per cent interest in 1953 and two per cent in 1954, so that the amount of bond interest due and unpaid amounted to \$20,510.00 at

the end of 1953 and \$24,439.00 at the end of 1954 and 1955. (R. 226-227) In this situation the corporation was, of course, never in a position to pay dividends and Schoedel so testified. (R. 226) Section 4 of Article V of the bond indenture agreement (Ex. 38 page 12; R. 225-226) contained the following prohibition against the corporation paying a dividend:

“That it will not declare or pay any dividend on any class of its stock . . . except out of net earnings of the Company properly available for the payment of dividends and further, that it will not declare or pay any such dividends if such payment will in any manner interfere with the conduct of the business operations of the Company.”

In addition, the laws of the State of Washington govern payment of dividends, Section 23.24.020 Revised Code of Washington providing: “Every corporation shall carry the amount of its capital stock upon its books as liability . . . In computing the aggregate of the assets of the corporation, the Board of Directors shall determine and make proper allowance for depreciation and depletion sustained and losses of every character . . .” and Section 23.24.030 Revised Code of Washington providing: “No corporation shall pay dividends: (1) in cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter, the amount of its capital stock.” (See Instruction R. 1004).

That Bowler knew of the serious financial condition of this company on September 2, 1953, about the time he began to sell his stock, is disclosed by the minutes of a directors' meeting attended by Bowler (Ex. 34B, R. 544).

A portion of these minutes reads as follows:

“ . . . The affairs of the company were discussed at length and Mr. Stout presented his report on the prospects of increasing the volume of business now being done. The loss of the ten-month period ending July 31, 1953 amounted (sic) to \$35,593.90 contained provisions for bond interest of \$16,087. and depreciation charge of \$12,000., or a total of \$28,087.00. The loss for the ten months without these charges would have amounted to \$7,506.90, or an average of \$750.69 per month. Bond interest in the amount of \$21,000 would be due December 31, 1953 and the company is confronted with the serious problem of how to meet this obligation.

“Mr. Stout reported that the balance of the sprinkler system works and running a new water main to the property will cost a balance of about \$4500. *Mr. Bowler proposed to buy 60,000 shares of common stock to net the company 7½¢ per share to raise the \$4500. necessary. He also proposed to buy the remaining 58,850 shares of stock at a later date to help towards financing the bond interest due December 31. Accordingly, it was unanimously agreed to give Mr. Bowler option to purchase 60,000 shares of common stock at 7½¢, said option to run until September 30 and another option to purchase the remaining 58,850 shares at 7½¢, this option to run until December 31, 1953.*” (Italics supplied).

With this unfortunate financial condition of the company in mind, an examination of the testimony concerning Bowler's representations clearly reveals the fraudulent pattern of his sales.

In September 1953 Bowler sold stock to Lala Dixon, a school teacher. Miss Dixon testified:

"He (Bowler) told me that it would pay ten per cent dividends . . . but not in 1953 because that was too late, but in 1954" (R. 22). "I asked if it were really good, because ten per cent sounded like quite a bit of income, and he said yes, it was good." "What I remember distinctly was that it was a good company and that the dividend would be paid." (R. 23).

In November 1953 Bowler sold stock to Frank Swannack, Jr., a farmer. Swannack testified concerning Bowler's representations regarding the company's financial condition:

"On the first meeting he (Bowler) indicated that the stock should pay a dividend of one cent a share some time after the first year . . . He indicated that the company was in good financial condition . . ." (R. 354).

J. P. Helme, a farmer, who purchased stock from Bowler in December 1953, testified that Bowler told him that this corporation was a good business and a going concern; that he only had eight thousand shares left to sell; that the stock would be put on the Spokane Stock Exchange for from thirteen to fifteen

cents a share after the first of the year 1954 and then would pay one cent a share; that four or five years after it had been put on the Stock Exchange it would increase in value until the stock would yield ten cents a share; that the company was selling this stock to secure money to convert storage space into parking facilities (R. 522, 523, 524, 531, 532).

In February 1954, Bowler sold stock to Henry J. Franz, a farmer. Franz testified that Bowler told him that the stock of the Spokane Warehouse and Storage Company was stock of a growing concern and that the chances for it becoming a big thing were very good and that a dividend of one cent a share was to be paid October 1, 1954 (R. 67, 71, 91).

In March 1954, Arthur Schorzman, a farmer, purchased stock from Bowler. Schorzman testified that Bowler represented that this stock:

“was definitely paying six per cent and it was a very good investment, that it was bound to keep on paying six per cent, and that the company was still having some indebtedness and when that is paid off they would pay ten per cent” (R. 614, 615, 629, 651).

In making a sale of stock to Archie Zickler, a farmer, in the spring of 1954, Bowler represented that this stock would show a good return. Zickler testified:

“He (Bowler) showed me a typewritten balance sheet, I believe you would say. The figures on that sheet showed a good earning for the preceeding period, I believe, and as of September '53 and the figures, the net profit on that sheet, would indicate that the company could easily pay ten per cent dividends on the stock outstanding” (R. 312).

Zickler recalled that this financial sheet “merely listed the operating expenses and income for, I believe, a twelve-month period” (R. 313). “There were no figures showing any operating losses or outstanding bonds or bond interest due” (R. 314, 315).

In March 1954, Bowler made the following representations to William Sutherland, a farmer, who purchased stock from Bowler:

“He said it was good stock, it was paying good dividends. He said it was paying one cent a share or ten per cent. I believe he said that it had paid that this last year. I believe he said that it was paying that now at this time. He said it would be a good investment” (R. 453, 454).

In selling stock to William G. Wahl, a farmer, in April 1954, Bowler stated, according to Wahl's testimony, “that it was a good investment and a paying proposition and if I would make some investment it would probably pay us part dividends or something that first fall, you know, '54. He didn't mention any specific amount of dividends but that it would pay” (R. 100, 101).

To Oscar Wagner, a farmer who purchased stock from Bowler in May 1954, Bowler varied somewhat his ordinary pattern. Wagner testified that Bowler told him that he had stock to sell for the Spokane Warehouse Company and that it was attractive stock. Bowler said the company had been operating at a loss through mismanagement but that it would be reorganized under new management and that the stock should pay seven per cent dividends and be put on the stock exchange or the Board of Trade and should double in price that summer. Bowler said he had a consignment to sell the entire stock of the company, the money to be used in reorganization of the company (R. 175 through 179).

M. J. Hyde, a farmer, purchased stock from Bowler in September 1954. Hyde testified that Bowler exhibited a statement showing that the corporation's business was operating at a profit (R. 156); that Bowler said he believed the stock would eventually show a dividend, probably within several years, that there should be good capital gains on the stock, the book value of the stock would increase (R. 160, 161), and that the stock would be put on the local Spokane Stock Exchange (R. 170).

Carl N. Heathman, a farmer, testified that when he purchased stock from Bowler in November 1954, Bowler told him that the Spokane Warehouse and Storage Company had an exceptionally good business



and very good income; that it was a prosperous business and an exceptional investment; that the by-laws of the company would allow only five per cent stock dividends but that right after the first of the year the stock would be on the Spokane Stock Exchange and since they were making so much more money than this five per cent dividends the stock would rise very rapidly on the stock exchange (R. 486, 487). Heathman further testified: "We bought the stock with the understanding that there was no bonds issued at all and that the building was practically paid for and that we were going to get dividends of five per cent immediately" (R. 512).

Loren P. Griffith, a farmer, who purchased stock in December 1954, testified that Bowler told him that this was a very good company; that Bowler read a financial statement of the company which indicated that the company was in pretty good financial condition and that in time would pay dividends. Bowler said that there was a mortgage against the company and that he was selling stock to retire the mortgage and when the mortgage was retired then the company would be able to pay dividends. This mortgage would be retired as soon as all the stock could be issued. Griffith testified that Bowler did not mention that there was three hundred fifty thousand dollars worth of outstanding bonds or that there was delinquent interest due on these bonds (R. 332 through 335).

Dan R. Anderson, a farmer, testified that in selling stock to him in December 1954, Bowler said that the company was paying five per cent on the stock, the original investment, each September; that they had paid five per cent dividends in the past and Anderson could expect five per cent in the future. Anderson also testified that Bowler said the company could have paid as high as ten per cent but the other five per cent was retained in the business, and that the finances of the company were "in good solid, sound condition" (R. 111, 112, 135-C).

Howard Underwood, a farmer, testified that when Bowler sold stock to him in January of 1955 Bowler stated that although the company was not in too good a financial position because they had installed a sprinkler system at a cost of \$17,000, at the rate the company was doing business Underwood would receive six per cent on his investment within two years, and that if Underwood ever needed the money to purchase land, or anything else, Bowler would buy the stock back from him at the price Underwood had paid (R. 442, 443).

Most of the witnesses testified positively that Bowler did not mention the outstanding bonds or delinquent interest. (Schorzman R. 630; Zeckler R. 315; Underwood R. 442; Griffith R. 334, 335; Helme R. 526; Heathman R. 490; Anderson R. 114; and Franz R. 98). Bowler admitted that he knew that

no money was being set aside by the company to pay these bonds which would become due in 1960. (R. 871).

*B. Representations Regarding Market Price and Listing of Stock on the Stock Exchange*

Until Bowler began selling his promotion stock to the public about September 1953, there had been no public distribution of this corporation stock except that given as a bonus to bond purchasers (R. 262). There had been no trading in the stock and no market for this stock existed. This fact was established by the testimony of Ben Harrison, Spokane stock broker and President of the Spokane Stock Exchange. He testified that no application for the listing of the stock of the Spokane Warehouse and Storage Company on the Spokane Stock Exchange had ever been filed and that this stock had never been traded among the brokers in the Spokane market (R. 431). Even Bowler had to admit there was no market and no trading (R. 912-913). In spite of this fact Bowler continually made misrepresentations concerning the existence of a market for this stock and relating to the listing of this stock on the Spokane Stock Exchange. These misrepresentations were always coupled with additional misrepresentations as to the expected increase in the market value of the stock. The purpose of these misrepresentations, of course, was to lead the investors to believe that they were buying a stock which could be readily disposed of at a

profit. The misrepresentations regarding the listing of the stock were always coupled with a representation that the stock would be listed at a price above the 10c figure at which Bowler was selling the stock.

Bowler told Helme in December, 1953, that the stock would be put on the Spokane Stock Exchange at from 13c to 15c a share after the first of the year, 1954 (R. 523, 524). Sutherland was told in March, 1954, that the stock would be listed on the Stock Exchange on June 1, 1954 at 15c a share (R. 455, 456). In December, 1953, Bowler advised Swannack that the stock would be placed on the Spokane Stock Exchange at a starting price of 12c to 14c a share after the first of the year (R. 354, 356, 404, 405). The witness Anderson testified that Bowler told him in December, 1954, that he would get this stock on the board in a month or two and that it would sell at not less than 12c a share (R. 113, 114). Bowler also told Anderson that although the stock was selling for 10c its valuation was 18c because of the condition of the company (R. 118, 119). Although Anderson first testified that Bowler had referred to the New York Stock Exchange, as emphasized in appellant's brief, he corrected this statement saying that Bowler was referring to one of the small stock exchanges around Spokane (R. 138, 139).

Other witnesses who testified that Bowler told them that the stock was soon to be listed on a stock ex-

change are Hyde (R. 170), Zickler (R. 313), Griffith (R. 344). Heathman, who bought his stock in November, 1954, was told that right after the first of the year the stock would be listed on the Spokane Stock Exchange and because the company was making so much more money than the 5% dividends which were allowed to be paid by the company by-laws, the stock would rise very rapidly on the stock exchange (R. 487). The witness Schorzman was also told by Bowler that the stock was going to be put on the Spokane Stock Exchange in the matter of a few weeks after March 1954 (R. 620).

Two of Schorzman's exhibits which were letters received from Bowler, referred to a market in this stock. Exhibit 88 is a letter Schorzman received from Bowler, written on Bowler's stationery, dated March 29, 1954, after Bowler had made an oral promise to sell Schorzman's stock without cost at any time within a year (R. 622). In this letter Bowler stated:

"In regard to your Spokane Warehouse and Storage Company common capital stock. *I feel that the market will remain strong* for some time and so if you are desirous of selling this stock at any time within this year I shall be happy to offer your stock on the *open market* at a price to net you not less than 10c per share." (Italics supplied).

Exhibit 94 is a letter from Bowler to Schorzman dated September 11, 1954, containing this statement:

“I will take care of part of the other stock for you if you wish but do suggest that you wait for another two or three weeks as I feel that the *market will be more advantageous* at that time due to the continued bus strike and the effect that it will have on this stock.” (Italics supplied).

Exhibit 69 is a letter Bowler gave to the witness Sutherland which is dated March 29, 1954, and is identical with Schorzman's Exhibit 88, referring to the fact “that the market will remain strong for some time.” Bowler's explanation was that he meant “the market that I had for it, the places I had to sell it. No one else that I knew of was selling it” (R. 940).

A second sale of stock was made to Swannack in August, 1954, and Swannack, in answer to a question as to why Bowler was then offering stock to him at 9c a share testified:

“Mr. Bowler said he would sell the stock at a discount. He said it was worth 11½c at that time but because of his position he could not sell it on the open market so that therefore he was offering it at a discount” (R. 364, 410).

Bowler flatly denied that he had represented the stock would be listed on the exchange (R. 904, 913).

#### C. *Proceeds from Sale of Stock Going to Corporation*

From September 1, 1953, until the early part of 1955, Bowler sold some 469,000 shares of personal

stock, nearly all of it at 10c a share (R. 921). Pursuant to his proposal made to the corporation, as evidenced by the minutes of September 2, 1953 (Ex. 34B), which gave Bowler an option to purchase 118,850 shares from the corporation at  $7\frac{1}{2}$ c per share, Bowler on January 12, 1954, paid the corporation \$8,850 for 118,000 shares of stock (R. 891). Bowler admitted that this was the only money received by the corporation from the sale of any of the stock that Bowler was offering (R. 927). This was used by the company pursuant to the minutes of the Directors' meeting on December 16, 1953 (Ex. 34C), to help make a partial payment of the bond interest due at the end of 1953. At that time a 3% interest payment amounting to \$10,500 was paid out to bondholders. Since Bowler was the only person who was engaged in selling his personally owned stock to the public, he was perhaps more interested than anyone else in seeing that some interest payment was made to the bondholders so as to avoid any possibility of a mortgage foreclosure which would, of course, have the effect of wiping out the common stock. In fact, Bowler admitted that one of the reasons he bought the stock was because he felt the company could then pay the full bond interest and "it would enhance the company and be of benefit to the company" (R. 886).

Regardless of the fact that Bowler was selling his own personal stock and, with the exception just noted,

putting all of the proceeds from these sales of stock into his own pocket, Bowler continuously represented that he was selling stock for the corporation and that the proceeds were to be used by the corporation for corporate purposes. In February, 1954, Bowler told Franz that the proceeds from stock sales were to be used by the company to repair facilities and increase the company's revenue. Bowler mentioned that one of these repairs was to be on a roof that leaked, causing cars to get dirty in the winter-time (R. 67, 70). In September, 1954, Bowler told Wahl that stock was being sold to raise money to improve the parking facilities so that the company could park more cars (R. 102). Swannack was also told by Bowler that the company was selling stock to pay for recent remodeling for parking facilities (R. 357). Griffith testified that Bowler said he was selling the company stock in order to retire a mortgage (R. 333, 334, 335, 336). Helme was told by Bowler that the proceeds were to be used by the corporation to convert storage space into parking facilities (R. 524). Both Zickler (R. 312) and Sutherland (R. 455) were told that the company needed money for expansion and to improve parking facilities. Schorzman (R. 614), Anderson (R. 111, 135D), and Wagner (R. 176) were told by Bowler that he was selling stock for the benefit of the company.



In connection with these representations as to the use of the proceeds by the corporation, Bowler sometimes used another misrepresentation apparently to encourage prospective investors to arrive at an immediate decision. He told them that the stock he was offering was the last of the stock to be sold by the company. This representation was made to Helme in December, 1953 (R. 523), to Wahl in September, 1954 (last opportunity to buy at the price of 10c a share) (R. 103), to Schorzman in March, 1954 (last stock that was to be sold and Bowler wanted to get rid of it so he could go on another job somewhere down on the coast) (R. 614), and to Anderson in December, 1954 (last stock Bowler had to sell and if Anderson took it all Bowler would knock off his commission of 5%) (R. 117). Bowler denied making any of these representations (R. 925-940).

*D. Representations Concerning Agreements to Repurchase Stock*

Another device used by Bowler in his scheme to induce persons to purchase the stock of Spokane Warehouse and Storage Company was to represent that he stood willing to repurchase the stock. Howard Underwood, a farmer who purchased stock in January 1955, testified that Bowler told him:

“That if I ever needed the money to purchase land with or anything like that, that he would buy the stock back from me at what I paid for it” (R. 443).

Sutherland also wanted an agreement from Bowler that he could get his money out of the stock in the event he needed it to build grain storage. Bowler told him he would buy the stock back within a year if Sutherland desired to sell (R. 457). Thereupon Sutherland and his wife wrote up an agreement in which Bowler would agree to buy back the stock within a year and pay at least ten cents a share (R. 460). Bowler said this agreement was not written up properly, so he prepared and sent Sutherland a letter (Ex. 69) dated March 29, 1954, which contained Bowler's promise to offer Sutherland's stock on the open market any time within a year to net Sutherland not less than ten cents per share (R. 461). In March 1955, Sutherland wrote to Bowler asking him if he would buy the stock back or try to sell it for him, but Bowler did not reply (R. 462, 463, 465).

Another written repurchase agreement was given by Bowler to Swannack. Bowler had persuaded Swannack to purchase stock at 9 cents a share by representing it was then worth 11½ cents but that Bowler, because of his position, could not sell it on the open market (R. 364). Swannack tried to cancel the transaction that evening, as Bowler had agreed, by calling Bowler in Spokane (R. 360). Bowler met Swannack the next morning and agreed to send Swannack's check back (R. 364). Instead Bowler wrote (Ex. 52, R. 366):

“Dear Frank:

“By the time I had gotten back to the office, the girl had taken all of my checks to the bank for deposit. As soon as it comes back, I will shoot it right down to you.

“Sorry.

Bill.”

Bowler then mailed the stock certificates to Swannack, and on September 17, 1954, (Ex. 53), and again on September 25, 1954 (Ex. 54), wrote Swannack promising to resell this stock for Swannack (R. 368, 371). After attempting to see Bowler for several months Swannack met him at Bowler's home on January 8, 1955, and Bowler prepared an order for Swannack to sign so that Bowler could sell Swannack's stock (R. 373, 374). Swannack finally succeeded in getting a promise from Bowler that Bowler himself would buy these shares back, but of course this promise was never fulfilled (R. 275). Bowler admitted that he had made a sale of 10,000 shares of his own stock to Underwood only two days after January 8, 1955, when he agreed to resell Swannack's stock (R. 918).

A somewhat different use of the possibility of repurchase was employed by Bowler in his sales to Schorzman. Bowler represented to Schorzman that he would sell him stock only if the latter would agree

to give him an option to repurchase it. Bowler had originally sold stock to Schorzman, agreeing that if Schorzman should wish to resell the stock Bowler would sell it for him at no charge and sent him a letter similar to that he had sent Sutherland (R. 623, 625, Ex. 88). Schorzman next saw Bowler in September 1954, when Bowler called at the ranch. Schorzman advised Bowler that he and his brother had decided to sell the stock as agreed, but Bowler said that would be foolish as the stock would have a substantial increase in value because of a bus strike in Spokane (R. 627). Schorzman then testified that Bowler said he had come to sell the Schorzmanns more stock, "that he was wanting to buy 60 acres out in the Spokane Valley for years from a lady from California who was now ready to sell to settle an estate and he was \$2250 short of making a purchase. She wanted \$10,000 and that he would sell 25,000 shares to us for \$2250 but that he would only sell them to us if we would sign an agreement that we would sell it back to him about January the 1st, 1955 and that he would give us \$500 for the transaction plus the dividend that we would receive in December from the company." Bowler had told the Schorzmanns that he "had sat in a few days before on a meeting and the company was definitely paying 6% dividend on the stock, and if the bus strike would last that business would be so improved in the next two or three months they could possibly pay more than 6%" (R. 628, 629).

Schorzman made the deal, and Bowler thereupon wrote out an agreement (Ex. 93) which he and Schorzman signed (R. 632). This agreement, dated September 9, 1954, read as follows:

“The undersigned does hereby agree to sell back to R. W. Bowler 25,000 shares of Spokane Warehouse & Storage Co. Common Capital Stock for a net price of \$2750 including dividend on or before Jan. 15, 1955.”

The next morning after making this deal Schorzman decided a mistake had been made and decided to cancel the deal. Bowler did not cancel the transaction but wrote Schorzman as follows in a letter dated September 11, 1954 (R. 635, Ex. 94):

“I received your note this morning when I came down as I had not been in since Wednesday afternoon after seeing you. I had been completing my other affairs that I spoke to you about when I was down there.

“I understand your situation completely but I did feel that between you and Arnold could handle it between yourselves and on your own. In that it is too late to cancel that agreement I will take care of part of the other stock for you if you wish but do suggest that you wait for another two or three weeks as I feel that the market will be more advantageous at that time due to the continued bus strike and the effect that it will have on this stock. Let me know what your feelings are on this and I shall do my best by you.”

Bowler repeatedly failed to repurchase or resell any of the stock he had sold Schorzman although Schorzman made many requests that he do so, and Bowler continued to make promises that he would (R. 639, 640, 642).

Bowler denied that he had told Schorzman he needed money to purchase land (R. 907 910). Bowler admitted that he didn't have \$7,500 in the bank at that time (R. 908) and that in fact his bank account only a few days before was overdrawn by \$489.98 as shown by Exhibit 103 (R. 907), so there was no truth to Bowler's representation that he was only \$2250 short of making a \$10,000 purchase of land from a lady from California.

All of this evidence conclusively proves Bowler's continued misrepresentations concerning his ability to either repurchase his customers' stock or resell it for them.

#### *E. Use of Mails in Counts I and III*

An essential element of the crime of which appellant was convicted was his use of the mails in connection with his sale of stock by fraudulent means. It is submitted that the mailing of the stock certificates to the investors named in Counts I and III of the Indictment (the two counts on which appellant was convicted) has been definitely established by

direct evidence. Anderson, the investor named in Count I, testified (R. 121) that he had received his stock certificate (Ex. 22) through the mails in the envelope identified as Exhibit 21. He testified the receipt given to him by Bowler (Ex. 20) was filled out and signed by Bowler (R. 120, 123). The printing of the name "Dan R. Anderson, Ritzville, Wash." on this receipt (Ex. 20) and the envelope (Ex. 21) is identical so the envelope was addressed by Bowler. In addition the envelope (Ex. 21) contains the return address "R. W. Bowler, 125 S. Stevens, Spokane 8, Washington."

The situation is exactly the same as to the use of the mails in the Griffith transaction (Count III). Griffith (R. 341) received his stock certificate (Ex. 49) in an envelope bearing Bowler's return address (Ex. 48) which was addressed by Bowler in the same manner as the receipt (Ex. 47) Bowler issued to Griffith.

In addition May Bernard, an employee of the accounting firm of Schoedel and Elder testified that she made transfers from Bowler's stock certificates at his direction and delivered the new certificates back to Bowler (R. 482, 483). Bowler admitted that he mailed or authorized someone to mail those certificates that he did not deliver personally (R. 916). Bowler's use of the mails for delivering the stock

certificates as charged in Counts II and III. could hardly be established with more certainty. Thus the existence of this essential element of a violation of Section 17(a) of the Securities Act of 1933 is clear. *U. S. v. Monjar* (D. C. Del.) 47F. Supp. 421; aff. 14 F. 2d 916, c.d. 325 U.S. 859.

#### F. *Other Evidence*

Other evidence in this case relates to Bowler's background, his character and reputation, his efforts to organize this corporation, to lease the properties, to purchase and remodel the buildings, to obtain permits and licenses and to sell the bonds. Much of appellant's brief is directed to a discussion of this evidence. It is the Government's contention that at this time such evidence is all relatively immaterial except as it has a bearing on Bowler's close association with the corporation and his admitted knowledge of its poor financial condition. Hence no time will be spent in discussing these background facts. The only issue here is whether Bowler sold his stock by fraudulent means.



## QUESTIONS INVOLVED

Because of the nature of the evidence in this case, it is felt that two questions are presented for determination, to-wit:

1. Was there adequate evidence to prove appellant guilty beyond a reasonable doubt on Counts I and III of the indictment?

2. Was appellant's motion for judgment of acquittal properly denied by the trial court, and if so, should the reviewing court affirm the trial court's order?

## SUMMARY OF ARGUMENT

The evidence in this case was direct. The acts, statements, and representations made by appellant in selling securities were proven by direct evidence, and appellant admitted knowledge of the material facts with which he was charged in concealing; and admitted making statements that were proven to be false. Both direct and circumstantial evidence was introduced as to the existence of particular elements of the crimes charged, to-wit: the existence of the scheme to defraud. The use of the mails was proven by direct evidence. Appellant's knowledge of the financial condition of the company was proven by direct evidence. The evidence, viewed in its entirety, was sufficient to prove appellant's guilt in Counts I and III of the indictment.

On a motion for judgment of acquittal the evidence should be considered in the light most favorable to the Government. The evidence of this case is such that it excludes every reasonable hypothesis but that of guilt and must be submitted to the jury. If reasonable minds, as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt, the question of fact is for the jury. The judgment of acquittal, then, was properly denied at each stage by the trial court. If, under this test, the case was properly submitted to the jury, its decision will be final.

This reviewing Court applies no special rule in reviewing circumstantial evidence on appeal. This circuit's rule is unlike the practice in other circuits. Evidence of a state of mind may be proven by evidence of surrounding circumstances, i. e. intent, knowledge. Great latitude is allowed in proving a fraudulent scheme. Evidence of transactions other than those directly related to Counts I and III of the crimes charged, are admissible to show the existence and nature of the scheme. Whether the evidence was inconsistent with every reasonable hypothesis of innocence of appellant was a question for the jury. The test on appeal urged by appellant respecting circumstantial evidence is not the rule with regard to this type of evidence in this circuit.

## ARGUMENT

THE EVIDENCE OVERWHELMINGLY ESTABLISHES THE USE OF THE MAILS IN A SCHEME TO DEFRAUD IN THE SALE OF SECURITIES AND THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR ACQUITTAL.

Both of the questions felt to be involved will be answered under this heading.

It is manifest from the foregoing summary of the evidence that the government sustained its burden of supporting the charges in the indictment of which appellant was convicted, *i.e.*, that appellant knowingly and willfully sold securities by means of numerous misrepresentations and material omissions and that the mails were used in furtherance of this scheme to defraud. Appellant does not contend there was any error in the admission of evidence, in the charge to the jury, or in any other respect, except as to the denial of his motion for acquittal discussed below.

Viewing the evidence, as it must be viewed, in the light most favorable to the government, [1] it was clearly sufficient to send the case to the jury and to support the appellant's conviction. As stated by this Court in *Elwert v. U.S.*, 231 F. 2d 928, 933 (C.A. 9, 1956):

“If . . . the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal.” [2]

We have seen that appellant sold his stock in Spokane Warehouse and Storage Company by representing that the company was in sound financial condition and operating at a profit, having paid dividends in the past and expected to continue to do so, when, as a matter of fact, the company had never operated at a profit, had substantially increased its earned surplus deficit each year and was in default in interest on its outstanding \$350,000 6% mortgage, the very existence of which appellant had concealed from some purchasers. We have seen, moreover, that appellant had lied about the market price of the stock and the likelihood of its being listed on an exchange, and had falsely represented that he would repurchase the stock if the purchasers should become dissatisfied. Finally, we have seen that he told investors that he

---

[1] See *Glasser v. U. S.*, 315 U.S. 60, 80 (1942); *Schino v. U. S.*, 209 F. 2d 67, 72 (C.A. 9, 1954), and *Woodard Laboratories v. U. S.*, 198 F. 2d 995, 998 (C.A. 9, 1952).

[2] See also *McCoy v. U. S.*, 169 F. 2d 776, 783 (C.A. 9, 1948), *cert. denied*, 335 U.S. 898 (1948). *Cf.*, *Suetter v. U. S.*, 140 F. 2d 103, 107 (C.A. 9, 1944).

was selling stock owned by the corporation, so that the proceeds of the sale would accrue to the company for its use in making improvements to increase earnings, when, as a matter of fact, he was selling his personally owned shares.

Appellant points to very little evidence in contradiction of the overwhelming evidence upon which the jury based its verdict and these contradictions consist for the most part of his own testimony denying the conversations to which others had testified. [3] That the securities sold were of a business which was in actual operation and had an increasing gross income, factors stressed by appellant (Br. pp. 12-13), cannot in any way palliate the numerous material misrepresentations and omissions which the jury found appellant made. Even assuming that appellant had an "honest belief that the enterprises would ultimately make money for the stockholders" this could not "excuse or justify" his false representations for the purpose of obtaining money for the enterprise. *Foshay v. U. S.*, 68 F. 2d 205, 210 (C.A. 8, 1933), *cert. denied* 291 U.S. 674.

---

[3] These denials are not relevant on this appeal since the testimony must be viewed in the light most favorable to the government. See cases cited in footnote [1], *supra*.

Appellant urges that the conviction should be reversed primarily upon language in a district court decision in another jurisdiction, which opinion is contrary to holdings of this circuit and, we submit, is erroneous. In *U. S. v. Gasomiser Corp.*, 7 F.R.D. 712 (D. Del., 1947) upon which appellant relies, the district judge granted a motion for acquittal, holding that the evidence as to whether a scheme to defraud existed was necessarily circumstantial and in a case based on circumstantial evidence a motion for acquittal must be granted unless guilt is "the only reasonable hypothesis from such evidence" i.e., "if there is any other reasonable hypothesis, although admittedly guilty may also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal" 7 F.R.D. at 718.

The proper test to be applied on a motion for directed verdict was clearly enunciated by this Court in *Stoppelli v. U. S.*, 183 F. 2d 391, 393 (C.A. 9, 1950) wherein it was stated:

"It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. *Curley v. U. S.*, 81 U.S. App. D.C.

229, 160 F. 2d 229, 230. In the cited case, Judge Prettyman pertinently observes: 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F. 2d at page 233."

The quoted language from the *Curley* case summarizes a careful analysis of Judge Prettyman, wherein he notes that it is *not* the law "that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict" nor is it the law that "if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal." *Curley v. U. S.*, 160 F. 2d 229, at 232. He continues (160 F. 2d 232-233):

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the



matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts.” [Footnote omitted.]

Similarly, in recent cases, this Court has reaffirmed its rule that so long as there is substantial evidence from which a reasonable man might infer a finding of guilt, it is error to direct a verdict of acquittal; that in situations where a finding of guilt depends on inferences to be drawn from the circumstances proved, the determinations whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. In *Charles v. U. S.*, 215 F. 2d 831 (C.A. 9, 1954), this Court stated:

“It is true that some of the evidence was circumstantial. However, it could not and cannot be said, as a matter of law, that reasonable minds could not conclude that the evidence was inconsistent with every reasonable hypothesis of innocence. Therefore whether the evidence was inconsistent with every such hypothesis was a question for the jury and not for the District Court or this court to determine.” 215 F. 2d at 833-834.

See also *Elwert v. U. S.*, 231 F. 2d 928, 933 (C.A. 9, 1956); *Penosi v. U. S.*, 206 F. 2d 529, 530 (C.A. 9, 1953); *Schino v. U. S.*, 209 F. 2d 67, 72 (C.A. 9, 1954); *Remmer v. U. S.*, 205 F. 2d 277, 287 (C.A. 9, 1953).

This Court has indicated, moreover, that circumstantial evidence requires no "different treatment" from "that to be accorded direct evidence," *McCoy v. U. S.*, 169 F. 2d 776, 784, and see the quotation from *Elwert v. U. S.*, 231 F. 2d 928, 933 set forth at p. 34-35 *supra*. Particularly with respect to the existence of a state of mind, which must in almost every case be inferred, it would make little sense to apply a different set of rules from that applicable where reliance is only on direct evidence. In the instant case the actions of the appellant, his intimate knowledge of the company and its finances, his misstatements to investors and his failure to advise them of relevant and important facts, taken together, constituted a pattern of conduct from which a jury could hardly fail to infer a scheme or artifice to defraud on the part of appellant [4]. As noted by this Court in *Remmer v. U. S.*, 205 F. 2d 277, 288 (1953), factors of this sort "are but part of a general pattern of conduct engaged in by appellant from which the jury could infer the requisite intent."

---

[4] *Cf. Horman v. U. S.*, 116 Fed 350, 352 (C.A. 6, 1902) which notes that the term "scheme to defraud" in the mail fraud statute "is used to characterize the guilty purpose and wrongful intent with which the scheme or artifice has been formed by the accused." *Cf. Dittman v. U. S.*, 224 Fed. 819, 823-824 (C.A. 6, 1915).

Finally, we note that even in a charge to the jury, as distinguished from the determination by the judge on a motion for acquittal, the circumstantial evidence rule urged by appellant would be improper. In *Holland v. U. S.*, 348 U.S. 121, 139-140 (1954) the Supreme Court explicitly stated that a charge that a verdict of acquittal must be reached if the evidence does not exclude every reasonable hypothesis but that of guilt is "confusing and incorrect." [5]

---

[5] *Cf. Penosi v. U. S.*, 206 F. 2d 529, 530 (C.A. 9, 1953).

CONCLUSION

For the reasons set out above it is submitted that the Judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,

*United States Attorney.*

RINER E. DEGLOW,

*Assistant United States Attorney.*

**No. 15,403**

**United States Court of Appeals  
For the Ninth Circuit**

---

IRA B. HOLMES,

*Appellant,*

VS.

HONORABLE A. S. HENDERSON, Presid-  
ing Judge, Eighth Judicial District  
Court of Nevada, Dept. II,

*Appellee.*

**Appeal from the United States District Court  
for the District of Nevada.**

**APPELLEE'S ANSWERING BRIEF.**

---

HAWKINS & CANNON,

HOWARD W. CANNON,

125 South Second Street, Las Vegas, Nevada,

*Attorneys for Appellee.*

**FILED**

**FEB 25 1957**

**PAUL P. O'BRIEN, CLERK**



## Table of Authorities Cited

---

Cases	Pages
Bradley v. Fisher, 20 L.Ed. 646 .....	5
Francis v. Crafts, 203 F. 2d 809 .....	5
Holmes v. Eighth Judicial District Court, Honorable A. S. Henderson, District Judge Presiding, 71 Nev. 307, 289 Pac. 2d 414 .....	5
Smith v. Smith, 68 Nev. 10 .....	4
Thompson v. Thompson, 247 P. 545 .....	3
Yasell v. Goff, 62 F. 2d 396 .....	5

## Codes

Title 42, U.S.C.A., Section 1983 .....	1, 5
--	------

## Constitutions

Nevada State Constitution, Article 6, Section 6 .....	3
---	---





No. 15,403

**United States Court of Appeals  
For the Ninth Circuit**

---

IRA B. HOLMES,

*Appellant,*

VS.

HONORABLE A. S. HENDERSON, Presiding Judge, Eighth Judicial District Court of Nevada, Dept. II,

*Appellee.*

**Appeal from the United States District Court  
for the District of Nevada.**

**APPELLEE'S ANSWERING BRIEF.**

---

Appellee submits that there is nothing in the record of the Transcript of Record from U. S. District Court for the District of Nevada, filed in the United States Court of Appeals for the Ninth Circuit, to support Appellant's Assignment of Errors.

Appellant's action, on which this Appeal is based, was brought in the United States District Court, for the State of Nevada, under Section 1983, Title 42, U.S.C.A.:

“Every person, who, under color of any statute, ordinance, regulation, custom or usage of any

state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Appellant's Complaint essentially alleged that Appellee, acting in his official capacity as District Judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, acted without jurisdiction in Case No. 54817 in the said District Court, in which case the Appellant herein was a party, and by reason of such action Appellant was damaged.

Appellant's Amended Complaint was dismissed with leave to amend and on the 22nd day of October, 1956, the Appellant's Second Amended Complaint was dismissed without leave to amend, for the reason the Complaint failed to state a cause of action upon which relief can be granted. (Transcript of Record from U. S. District Court for the District of Nevada, p. 92.) An appeal was taken from this order.

Appellant's Second Amended Complaint alleges “that at all times material hereto the Defendant was a duly elected, qualified, and acting Judge of the Eighth Judicial District of the State of Nevada in and for the County of Clark.” (Tr. p. 44.)

Appellant further alleges he commenced Case No. 54817 by filing “an action for divorce against one Irene S. Holmes”. (Tr. p. 45.)

He then alleges an Order of Dismissal was filed by the Court Clerk at his request (Tr. p. 46); that an order vacating the Order of Dismissal was made upon motion of his then wife, and party defendant of the said Case No. 54817 (Tr. p. 47), and that thereafter his then wife obtained a Decree of Divorce based on an Amended Answer and Cross-Complaint wherein his wife was awarded certain community property of the parties (Tr. p. 48).

Appellant's allegation of damage rests upon paragraph 19 of the Second Amended Complaint, "that the defendant herein was without jurisdiction in the said Case No. 54817 for the reason that no service of Summons was made upon the Plaintiff, and that said Judgment and Decree of Divorce is null and void." (Tr. p. 48.)

It is respectfully submitted that Appellant's Second Amended Complaint fails to state a claim upon which relief can be granted, and it was properly dismissed in the United States District Court for the State of Nevada.

Appellant alleges Appellee was at all times mentioned in his Complaint, the duly elected and qualified District Judge. (Tr. p. 44.)

There is no question of the State District Court having original jurisdiction in divorce matters. Article 6, Section 6, Nevada State Constitution. "The District Court in the several judicial districts of this state shall have original jurisdiction in all cases in equity . . ." *Thompson v. Thompson*, 247 P. 545, interprets this section.

Appellant's sole claim then rests on the contention that because he was allegedly not served with a copy of a Summons and Cross-Complaint, the District Court lost jurisdiction and any subsequent orders made by the Court were of no effect.

It is respectfully submitted the Appellee acted in his judicial capacity over a matter within his jurisdiction in Case No. 54817. So acting, he acted with immunity from any liability based on action purportedly in excess of jurisdiction. The record shows that the Judge of the Eighth Judicial District Court on the 5th day of November, 1952, entered an order vacating the Order of Dismissal theretofore entered by the Clerk of said Court on April 14, 1952 (Tr. pp. 55-57); that the attorney for the Plaintiff, being the Appellant herein, was present in Court representing said Plaintiff and that the said attorney did not withdraw as attorney of record for the Plaintiff and Appellant herein until the 8th day of December, 1952, (Tr. pp. 55-57). The Courts have consistently held that a Court has the authority to vacate, amend, modify or correct a judgment or order entered by that Court, providing the same is timely filed. An Order of Dismissal having been filed, the District Court retained jurisdiction to vacate the order. *Smith v. Smith*, 68 Nev. 10. In that case Esther Smith brought an action against William Smith and Isabella Smith to set aside an order which vacated a divorce decree between William and Isabella, while Esther and William were married. The original divorce decree was vacated on

the grounds the divorce was obtained by fraud on the part of William.

If it is conceded the Appellee committed error in the case so as to render the Decree of Divorce invalid, there was still jurisdiction over the subject matter and, therefore, any orders made by Appellee were made with immunity.

One of the most fundamental principles of law is that whenever a judicial officer acts in his judicial capacity, he acts with immunity. *Bradley v. Fisher*, 20 L.Ed. 646; *Yasell v. Goff*, 62 F. 2d 396; *Francis v. Crafts*, 203 F. 2d 809.

Appellant's recourse, if any, in Case No. 54817, would have been to appeal the case to the Nevada State Supreme Court. Appellant brought a Writ of Certiorari to the Nevada State Supreme Court and the Writ was denied. The Supreme Court held that petitioner had reaped the benefits of the Decree he claimed was void. *Holmes v. Eighth Judicial District Court, Honorable A. S. Henderson, District Judge, Presiding*, 71 Nev. 307, 289 Pac. 2d 414.

It is apparent that to permit Appellant to maintain a cause of action under Section 1983, Title 42 U.S.C.A. and hold a judicial officer liable for error committed within his judicial function, would expose judicial officers to the mischief of disgruntled litigants and by that mischief destroy our judicial system. The authorities are numerous in support of Appellee's contention herein and will not be restated as they appear in

Appellee's Motion to Dismiss and in the Court's decision thereon as a part of the record on Appeal. It is respectfully submitted that the Appeal be dismissed.

Dated, Las Vegas, Nevada,  
February 21, 1957.

HAWKINS & CANNON,  
HOWARD W. CANNON,  
*Attorneys for Appellee.*

No. 15404

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

M. J. KAHN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

---

CHARLES H. CARR and  
GEORGE E. DANIELSON,  
417 South Hill Street,  
Los Angeles 13, California,  
*Attorneys for Appellant.*

FILED

APR 30 1957

PAUL P. O'BRIEN, CLERK





## TOPICAL INDEX

	PAGE
Jurisdictional statement .....	1
Statement of the case.....	2
The statutes involved.....	5
Statement of facts.....	6
Preliminary statement .....	6
The setting of the case.....	6
The scope of the evidence.....	9
The facts as to Count Two.....	10
The facts as to Count Four.....	11
The evidence as to Count Five.....	11
The facts as to Count One.....	13
Summary of evidence.....	13
Specifications of error.....	13
Argument .....	14
Preliminary statement .....	14

### I.

The evidence is not sufficient to support and sustain the judgment of conviction of the offenses charged in Counts One, Two, Four and Five of the Information.....	14
Liability for the tax.....	14
What is "commercialized" gambling?.....	19
The meaning of "engaged in business".....	20
The Qualin bets.....	25
Conclusion .....	26

# TABLE OF AUTHORITIES CITED

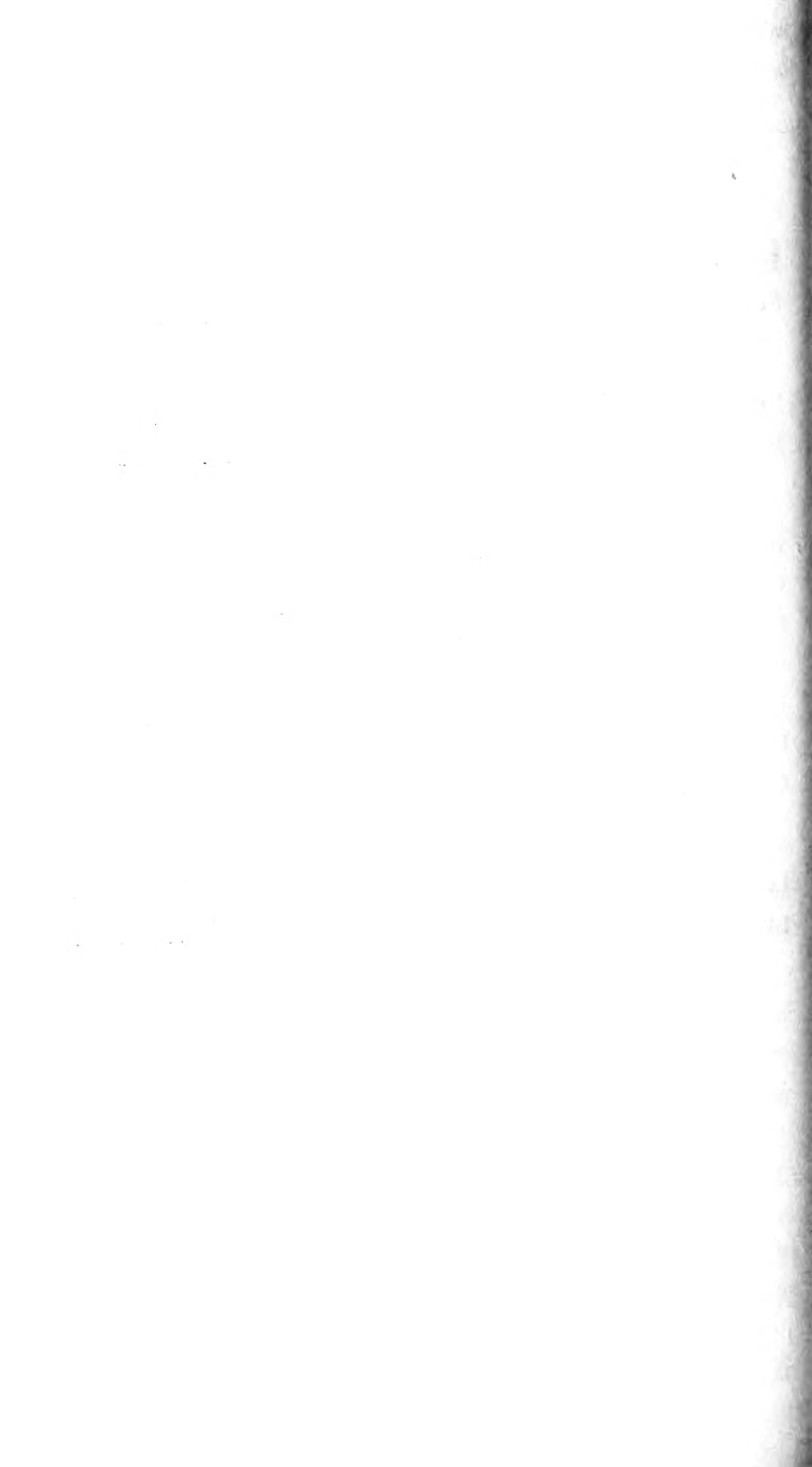
CASES	PAGE
Burk v. United States, 134 F. 2d 879.....	22
Cagnina v. United States, 223 F. 2d 149.....	17
Cecil v. Commissioner, 100 F. 2d 896.....	22
City of Los Angeles v. Cohen, 124 Cal. App. 2d 225, 268 P. 2d 183 .....	23
Dunlap v. Oldham Lbr. Co., 178 F. 2d 781.....	22
Employers Liability, etc. Co. v. Accident Casualty Co., etc., 134 F. 2d 566 .....	22
Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389.....	20
Foss v. Commissioner, 75 F. 2d 326.....	22
Harrisburg Hotel Co. v. United States, 145 F. 2d 116.....	22
Hazen v. National Rifle Ass'n, 101 F. 2d 432.....	22
Helvering v. Wilmington Trust Co., 124 F. 2d 156.....	22
Hodges v. United States, 223 F. 2d 140.....	15, 16, 17
Kales v. Commissioner, 101 F. 2d 35.....	22
Kelley v. United States, 202 F. 2d 838.....	22
Mansfield v. Hyde, 112 Cal. App. 2d 133, 245 P. 2d 577.....	23
Richards v. Commissioner, 81 F. 2d 369.....	21
Roseland v. Phister Mfg. Co., 125 F. 2d 417, 139 A. L. R. 1013 .....	22
Sagonias v. United States, 223 F. 2d 146.....	16, 17
San Fernando M. Land Co. v. Commissioner, 135 F. 2d 547.....	22
Section Seven Corp. v. Anglim, 136 F. 2d 155.....	21
Supreme Malt Products Co. v. United States, 153 F. 2d 5.....	23
Union League Club v. Johnson, 18 Cal. 2d 275.....	23
United States v. Forys, 113 Fed. Supp. 580.....	19
United States v. Hercules Mining Co., 119 F. 2d 289.....	22
United States v. Warren R. Co., 127 F. 2d 134.....	22
Von Baumbach v. Sargent Land Co., 242 U. S. 503, 61 L. Ed. 460 .....	21
Walker v. United States, 93 F. 2d 383.....	22

REPORTS	PAGE
House Report, pp. 1838-1839.....	18
Senate Report, pp. 2090-2091.....	18

RULES	
Federal Rules of Criminal Procedure, Rule 23.....	4
Federal Rules of Criminal Procedure, Rule 29.....	3

STATUTES	
Internal Revenue Code of 1939, Sec. 3285.....	1, 3, 5, 14, 15
Internal Revenue Code of 1939, Sec. 3285(d).....	20
Internal Revenue Code of 1939, Sec. 3285(e).....	25
Internal Revenue Code of 1939, Sec. 3290.....	1, 2, 3, 5, 14, 15, 16
United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	2

TEXTBOOKS	
12 Corpus Juris Secundum, p. 767.....	23
14A Words and Phrases, p. 188 et seq.....	23



No. 15404

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

A. J. KAHN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of four counts of an information charging him with (Count I) failure to pay the occupational tax on wagering as imposed by Section 3290 of the Internal Revenue Code of 1939, and with (Counts II, IV, and V) failure to pay the excise tax on wagers as provided in Section 3285 of the Internal Revenue Code of 1939. [Tr. pp. 3-6, 326, 26-28.]

The violations are alleged to have been incurred in Los Angeles County, California, within the Central Division of the Southern District of California, in that appellant is alleged to have been required by law to pay said taxes to the District Director of Internal Revenue at Los Angeles, California. [Tr. pp. 3-6.]

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

### **Statement of the Case.**

The appellant was convicted in the United States District Court for the Southern District of California, on four counts of an information filed in said District Court on November 17, 1955. [Tr. pp. 6, 326, 26-28.] Trial by jury was waived [Tr. p. 15] and trial was by the court, the Honorable William M. Byrne, United States District Judge, judge presiding.

The information was in five counts. The court found the defendant not guilty of Count Three. [Tr. p. 326.] Count One charged that during the tax year beginning July 1, 1953, and ending June 30, 1954, the appellant in San Diego County, California, engaged in the business of accepting wagers with respect to horse races, etc., and by reason of such activity he was required by law to pay the occupational tax on wagering as imposed by Section 3290 of the Internal Revenue Code of 1939, to the District Director of Internal Revenue in Los Angeles, California, and that well knowing those facts, the appellant wilfully and knowingly failed to pay said tax. Counts Two, Four, and Five, charge that during the months of September, 1953, December, 1953, and March, 1954, respectively, the appellant, in San Diego County, California, engaged in the business of accepting wagers with respect to horse races, in specific amounts as alleged in each Count, upon which wagers there was due and owing to the United States of America an excise tax on wagers as provided

in Section 3285 of the Internal Revenue Code of 1939, in specific amounts alleged in each Count, which he was required by law to pay to the District Director of Internal Revenue, at Los Angeles, California, and that well knowing those facts the appellant wilfully and knowingly failed to pay said tax. [Tr. pp. 3-6.]

The offense charged in Count One of the Information is an alleged violation of the statutory requirement (Sec. 3290, I. R. C. of 1939) that a person *who is engaged in the business of accepting wagers* shall pay a special tax of \$50.00 per year. This is an occupational tax.

The offenses charged in Counts Two, Four and Five of the Information are alleged violations of the statutory provision (Sec. 3285, I. R. C. of 1939) imposing an excise tax, equal to 10 per centum of the amount thereof, on wagers accepted by persons who are *engaged in the business of accepting wagers*.

Both of the above offenses are misdemeanors.

The appellant filed a Motion for Bill of Particulars [Tr. pp. 8-10] and on January 16, 1956, the District Court granted that motion in part. [Tr. pp. 10-11.] Thereafter appellee filed its Bill of Particulars [Tr. pp. 11-13] which specified that the wagers alleged in Counts Two through Five were placed with the "defendant" by Eddie Qualin and Hubert Ursich, and went on to specify the dates and the amounts of the wagers.

At the close of evidence offered by the government [Tr. p. 187] appellant moved the Court, pursuant to Rule 29, Federal Rules of Criminal Procedure, for a Judgment of Acquittal. The motion was denied. [Tr. p. 193.] Appellant renewed his said motion at the conclusion of appellant's case and at the close of all the evi-

dence. [Tr. pp. 312, 319.] The motion was again denied. [Tr. p. 313.]

The Court found appellant guilty of Counts One, Two, Four and Five [Tr. p. 326] and not guilty of Count Three. [Tr. p. 326.]

At the close of the evidence the appellant requested the Court to find the facts specially under Rule 23 of the Federal Rules of Criminal Procedure [Tr. p. 326]; Special Findings of Fact were made and filed on September 20, 1956. [Tr. pp. 22-24.] On October 1, 1956, the Court sentenced appellant to pay a fine of \$10,000.00 on Count One of the Information, and committed appellant to the custody of the Attorney General for a period of one year on each of Counts 2, 4 and 5, to run concurrently, execution suspended, probation granted for a period of 3 years on condition defendant pay the fine assessed on Count 1 on or before December 1, 1956. [Tr. pp. 26-27.]

Notice of Appeal was duly filed on October 9, 1956. [Tr. pp. 28-30.] On November 28, 1956, the District Court made and filed its Order, staying the sentence of payment of fine pending appeal and specifying the terms therefor [Tr. pp. 34-35], and on November 29, 1956, pursuant to said Order, the appellant filed his bond for the payment of said fine with the Clerk of the District Court. [Tr. pp. 35-36.]

The appellant is at liberty pursuant to the terms of the judgment and commitment.



## The Statutes Involved.

The pertinent portions of the statutes involved are as follows:

Section 3290, Internal Revenue Code of 1939:

“A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.”

Section 3285, Internal Revenue Code of 1939:

“(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

\* \* \* \* \*

“(d) Persons liable for tax. Each person who is *engaged in the business* of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . . (Emphasis added.)

“(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.”

## Statement of Facts.

### Preliminary Statement.

At the outset, appellant wishes to state that he recognizes that on appeal this Court will take that view of the evidence which is most favorable to the appellee and will not review questions of fact which have been decided by the trial court if and when there is any substantial evidence to support them. Although appellant will not question the correctness of the rulings of the trial court admitting into evidence numerous of the checks which were offered as government's exhibits, appellant does not thereby concede that such checks should have been admitted nor does he concede, except for the purposes of this brief, the truth of the testimony which served as the foundation for the admission into evidence of those checks. There are only one or two exceptions to this position, which are specifically noted below.

It is appellant's position that, even if all of the evidence before the trial court is assumed to be true and correct, and properly admitted, that evidence does not support a conviction of the offenses charged.

### The Setting of the Case.

The appellant, A. J. Kahn, is a man of 64 years who has lived in San Diego, California, for about 34 years. At the time of the alleged offenses, 1953-1954, he was actively engaged in business as the ". . . manager of about five or six clubs, family enterprises." [Tr. pp. 281, 199, 210, 236.] They were a chain of restaurants

and bars in San Diego. [Tr. p. 281.] His duties consisted primarily of doing all of the buying for all six of those clubs and commissaries, of hiring most of the help, and acting in a supervisory capacity of all of them. [Tr. pp. 282, 198, 199.] One of these businesses was known as the Club Royal, located at the corner of 3rd & "C" Streets in San Diego. [Tr. pp. 41, 281ff.]

Third Street, at that particular place, is an area having a large number of bars; in fact, in that block, except for one card room [Tr. p. 284] and one eating place, there are nothing but bars. [Tr. pp. 218-219.]

The government's principal witness, Hubert Ursich, was the captain of a fishing boat [Tr. pp. 76, 84] who at times made substantial money. [Tr. p. 100.] Ursich and appellant, A. J. Kahn, had been friends for several years [Tr. pp. 282, 291, 299]; estimated by Ursich at 8 or 9 years. [Tr. pp. 40-41, 82.] They remained friends until March of 1954 [Tr. pp. 82, 84, 122, 292, 296, 302, 306-309] when a disagreement arose between them.

As a result of that disagreement Ursich voluntarily went to the Internal Revenue Service [Tr. pp. 124, 132, 136, 147], within a month [Tr. p. 124], and formally complained that appellant was engaging in bookmaking in violation of the statutory provisions under which this prosecution was had; that act precipitated the investigation which led to this prosecution.

Appellant Kahn had also been acquainted for a number of years with the government's other witness, Qualin

[Tr. pp. 140, 146], another fisherman [Tr. p. 144], who was a friend of Ursich. [Tr. p. 144.] An animosity had also developed between Qualin and appellant. [Tr. p. 150.]

Ursich, when in from the sea, frequented and “hung out” at Club Royal a great deal [Tr. pp. 94, 126-129, 182-184, 200-203] and was considered to be a good spender. [Tr. pp. 206, 209, 270-271, 284, 291, 298.]

The area of 3rd and “C” Streets in San Diego was frequented by bookmakers and was known as the place where,

“ . . . if you want a little action in horse racing, that is where everybody hangs out.

Q. You mean not just the Club Royal. A. No, Sir.

Q. But in the whole row, is that right? A. In fact, you can’t get by the corner without running into somebody with a sheet.” [Tr. pp. 218-219.]

The bookmakers in the area also came into the Club Royal and were frequently soliciting bets from the patrons at the bar. [Tr. pp. 81-82, 126-129, 130, 180, 181, 199-200, 206, 209, 216-219.]

The management of Club Royal tried to run the bookmakers out from time to time but they were unsuccessful.

“ . . . and, of course, they were very good customers, and we just got to tolerate them a lot.” [Tr. pp. 297-298, 181.]

As a part of his business policy appellant accommodated his customers by cashing their checks for them [Tr. pp.

182, 209-218, 256-259]; witness Ursich cashed numerous checks in that manner. [Tr. pp. 95, 182-183, 200-203, 206, 232-233, 249, 262, 269-271, 285, 286, 299-300.]

While frequenting Club Royal Ursich place many bets on horse races with the various bookmakers who "worked" the Club. [Tr. pp. 81-83, 126-130, 181, 200-203, 206, 209, 234, 285, 291, 297, 298.] Ursich himself, the government's witness, testified that sometimes you could see five or six bookmakers there at a given time. [Tr. p. 130.]

### **The Scope of the Evidence.**

In its Bill of Particulars the government stated that the wagers alleged in Counts Two through Five were placed with the appellant by Eddie Qualin and Hubert Ursich. [Tr. p. 11.] The evidence produced by the prosecution consisted of testimony and of cancelled checks relating to purported wagers by said Qualin and said Ursich and was intended to prove the specific wagers of Counts Two through Five as set forth in the Bill of Particulars.

It is evident that the appellee's evidence in support of Counts Two, Four and Five was also considered as supporting Count One, viz., that appellant was a person who was "engaged in the business" of accepting wagers. There was no other evidence to support the charge. Therefore, the facts will be briefly reviewed as they apply to each of Counts Two, Four and Five, for, unless those facts support the conviction on Count One, it will fail.

**The Facts as to Count Two.**

On direct examination Hubert Ursich identified the cancelled checks which became the plaintiff's exhibits listed below and testified, in substance, that he had given them to appellant as horse race bets during September, 1953. All were payable to "cash."

Exhibit No.	Date	Amount	Transcript Reference
1	Sept. 4, 1953	\$ 50.00	44, 47
2	9-8-53	120.00	45-47
3	9-16-53	300.00	46-47
4	9-22-53	400.00	47
5	9-22-53	50.00	48
6	9-22-53	50.00	49-50
7	9-23-53	100.00	50
7 Wagers 5 days		\$1,070.00	

In addition, Eddie Qualin testified that on the Saturday before Labor Day, 1953 (September 5, 1953), at Del Mar Race Track [Tr. p. 140], he placed three bets of \$300 apiece. [Tr. p. 141.] He didn't place the bets at the parimutuel window because he was a fisherman and ". . . we hadn't unloaded, we couldn't get paid yet . . .," so he approached Mr. Kahn and asked him to take his "action," ". . . a bet at the race track." [Tr. p. 141.] The bet was actually placed at Del Mar race track. [Tr. p. 140, near bottom.]

If this latter testimony is considered proof of wagers "accepted" by appellant the outer limits of the evidence establish a total of 10 wagers, with two people, in 6 days, grossing \$1,970.00, during the month of September, 1953.

If the latter testimony does not amount to proof of wagers "accepted" by appellant, the outer limits of the evidence establish only 7 wagers, with one man, in 5 days, grossing \$1,070.00, during the month of September, 1953.

**The Facts as to Count Four.**

On direct examination Hubert Ursich identified the cancelled checks, which became the plaintiff's exhibits listed below, and testified, in substance, that he had given them to appellant as horse race bets during December, 1953. All were payable to "cash."

<u>Exhibit No.</u>	<u>Date</u>	<u>Amount</u>	<u>Transcript Reference</u>
10	12-1-53	\$ 50.00	53
11	12-5-53	100.00	54
12	12-11-53	100.00	54
13	12-11-53	200.00	56
14	12-14-53	400.00	56
15	12-14-53	400.00	57
16	12-14-53	100.00	58
7 Wagers 4 days		\$1,350.00	

The outer limits of this evidence establish that during the month of December, 1953, appellant made a total of 7 wagers in 4 days, with one man, grossing \$1,350.00.

**The Evidence as to Count Five.**

On direct examination Hubert Ursich identified the cancelled checks which became the plaintiff's exhibits listed below and testified, in substance, that he had given

them to appellant as horse race bets during March, 1954. All were payable to "cash."

<u>Exhibit Number</u>	<u>Date</u>	<u>Amount</u>	<u>Transcript Reference</u>
18	3-1954	\$200.00	59
19	3-4-54	100.00	59-60
20	3-4-54	100.00	60
21	3-5-54	200.00	60
22	3-6-54	290.00	61
23	3-6-54	260.00	61
24	3-9-54	220.00	62
25	3-11-54	200.00	62
26	3-12-54	100.00	63
29	3-17-54	1000.00	64-65
30*	3-18-54*	460.00*	65-66
31	3-18-54	480.00	66
12 wagers 9 days		\$3610.00	

If we are to accept all of the above exhibits, then the outer limits of this evidence establish that during the month of March, 1954, appellant made a total of 12 wagers, on 9 days, with 1 man, for a gross of \$3,610.00; if we eliminate No. 30 there are only 11 wagers for a gross of \$3,150.00.

---

\*As to Exhibit 30, above, after testifying on direct examination that this was a horse race bet with appellant [Tr. pp. 65-66], Witness Ursich testified on cross-examination [Tr. p. 114], as follows:

"Q. Now, the next exhibit is No. 30, I believe, Exhibit No. 30, and that is a check for \$460 to 'Cash', and it is endorsed on the back 'A E. Anderson.' It is dated March 18, 1954. Is that one of the checks Mr. Anderson brought you the cash back on? A. As long as it is Mr. Anderson's signature alone, I take exception to that check.

Q. You mean you retract what you previously said? A. I retract what I said about that check."



### The Facts as to Count One.

As mentioned above, the evidence supporting the excise tax violations charged in Counts Two, Four and Five must necessarily be considered as supporting the occupational tax violation charged in Count One or it must fail. There is no other evidence.

### Summary of Evidence.

<u>Count</u>	<u>Wagers</u>	<u>Gross Amount</u>	<u>No. of Men Involved</u>
II	7 or 10	\$1,070 or \$1,970	All to
IV	7      7	\$1,350      \$1,350	one or
V	11 or 12	\$3,150 or \$3,610	two men.
<hr/>			
Total			
for year 25 or 29		\$5,570      \$6,930	

### Specifications of Error.

#### I.

The District Court erred in denying appellant's motion for judgment of acquittal at the close of the evidence offered by the Government.

#### II.

The District Court erred in denying appellant's motion for judgment of acquittal at the close of all the evidence.

#### III.

The evidence is not sufficient to support and sustain the Special Findings of Fact.

#### IV.

The Special Findings of Fact are not sufficient to support and sustain the general finding of "guilty" of the offenses charged in Counts I, II, IV, and V of the Information in the above-entitled criminal proceedings.

#### V.

The evidence is not sufficient to support and sustain the judgment of conviction of the offenses charged in Counts I, II, IV, and V of the Information in the above-entitled criminal proceedings.

## ARGUMENT.

### Preliminary Statement.

Appellant recognizes that the above Specifications of Error are, in practical effect, different ways of stating the same fundamental error by the District Court and that to establish one is, in effect, to establish each of the others. Their common denominator, and the fundamental error of the District Court, is that the evidence of the prosecution, taken at full face value, does not support a conviction of the offenses charged. For that reason appellant submits the following argument in support of each of his Specifications of Error.

#### I.

**The Evidence Is Not Sufficient to Support and Sustain the Judgment of Conviction of the Offenses Charged in Counts One, Two, Four and Five of the Information.**

#### **Liability for the Tax.**

In Count One of the Information appellant was charged with failure to pay the occupational tax on wagering imposed by Section 3290 of the Internal Revenue Code of 1939, and in Counts Two, Four and Five he was charged with failure to pay the excise tax on wages imposed by Section 3285 of the Internal Revenue Code of 1939. By its own terms Section 3290 imposes the liability to pay the occupational tax only on those who are liable to pay the excise tax under Section 3285, or on those who are “. . . engaged in receiving wages for or on behalf of any persons so liable.” There was nothing in the evidence to indicate that appellant was engaged in receiving wagers “. . . for or on behalf of any person so liable.” The wagers assumed to be established by the evidence were clearly wagers between the appellant,

on the one hand, and Ursich or Qualin on the other. Thus, to bring appellant into the definition of those who are liable to pay the occupational tax it is necessary to show that he is one of those who are liable to pay the excise tax imposed by Section 3285.

Section 3285 defines those persons who are liable to pay the excise tax as follows:

“(d) Persons liable for tax. Each person who is engaged in the *business of accepting wagers* shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . .”  
(Emphasis added.)

Appellant submits that it is significant that the Congress used the phrase “. . . who is engaged in the business of accepting wages . . .” in defining those persons who are liable to pay the tax. It is appellant’s position that he was not so engaged at the time of the offenses charged and that he has never, at any time, been so engaged.

There are few decisions interpreting the above definition of who is liable to pay the tax. A series of three cases touching upon the subject, but not clearly defining the phrase, came out of the Fifth Circuit in 1955.

In *Hodges v. United States* (5 Cir., 1955), 223 F. 2d 140, the appellant was convicted of failure to pay the occupational tax required by Section 3290 and his conviction was affirmed on appeal. In that case there was proof of appellant’s participation in only two transactions involving commercialized wagering but the evidence established that he had received the wagers on each occasion “for or on behalf” of persons who truly were engaged in the business of accepting wagers, commercialized gambling, and that, of course, he did so knowingly.

“Therefore, we are of the opinion that in imposing taxes upon *commercialized gambling*, the Congress intended that the ‘occupational’ tax be paid not only by those operating such businesses, but also by anyone who knowingly received wagers on behalf of such persons. When appellant knowingly received Thompson’s bets for King, he voluntarily became King’s agent and placed himself within that class of persons against whom the Congress assessed the special tax.” (Emphasis added.)

*Hodges v. United States* (5 Cir, 1955), 223 F. 2d 140, 143.

On the same date the same Court handed down another similar decision holding that the employee or runner of a person engaged in accepting wagers would have to pay the special tax imposed by Section 3290. In *Sagonias v. United States*, the Court of Appeals for the Fifth Circuit held:

“As we pointed out in the Hodges case, the primary purpose of the statute as a whole was to produce revenue by subjecting *commercialized gambling* to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation.” (Emphasis added.)

*Sagonias v. United States* (5 Cir., 1955), 223 F. 2d 146, 147.

The same court handed down a third decision on the same date holding that the occupational tax had to be paid by a person engaged in receiving wagers for or on behalf of a person engaged in the business of accepting wagers.

“ . . . [T]he criminal sanctions for engaging in the occupation of accepting wagers without payment of the special tax apply likewise to engaging in receiving wagers for or on behalf of a person in that occupation; and the jury could properly infer that Cagnina did acts in the latter category.”

*Cagnina v. United States* (5 Cir., 1955), 223 F. 2d 149, 151.

None of the above cases supports the position which the appellee must support in the case at bar, namely, that the wagers proved between appellant and Ursich, and between appellant and Qualin, if any, wagers which were purely friendly wagers, were such as to place appellant in the category of a person “engaged in the business” of accepting wagers. Nor is there any evidence indicating that appellant accepted such wagers “*for or on behalf of*” any person who was engaged in the business of accepting wagers.

It is apparent from the above decisions that the Fifth Circuit has recognized, as properly it should, that the wagering tax laws are directed at the taxation of *commercialized* gambling. See the cited portions from *Hodges v. United States* and from *Sagonias v. United States*, set forth above.

The underlying fact that the laws in question are intended to apply only to *commercialized* gambling, and are definitely not to apply to the friendly or social type

of “bet,” is stated in precisely so many words in the Congressional Reports for the Revenue Act of 1951, which included the statutory provisions in question.

In commenting on the proposed taxes on gambling the House Report provided:

“Commercialized gambling holds the unique position of being a multibillion dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which made it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

\* \* \* \* \*

“Wagers on sports events or contests, to be taxable, must be placed with a person *engaged in the business* of accepting such wagers. *The purpose of this requirement is to exclude from tax the purely ‘social’ or ‘friendly’ type of bet.*” (Emphasis added.)

U. S. Code Cong. Service, 1st Sess., 82nd Cong., 1951, House Report, pp. 1838-1839. See also Senate Report, pp. 2090-2091.

There are as yet no reported decisions clearly defining the difference between the “social or friendly” type of bet and what the Congressional committees and the Fifth Circuit have defined as “commercialized gambling.” The cases reported from the Fifth Circuit deal with what is clearly commercialized gambling. Of little help is the

decision of the United States District Court for the District of Rhode Island, commenting that “. . . the acceptance of a single wager does not make the acceptor subject to this tax, or subject to a penalty for not paying the tax . . .”

*United States v. Forays*, D. C. R. I. 1953, 113 Fed. Supp. 580, 582.

### **What Is “Commercialized” Gambling?**

From the House and Senate committee reports, quoted above, it is clearly apparent that the statutes of which appellant now stands convicted were intended by the Congress to impose an excise tax on the proceeds of *commercialized gambling* and to impose a special occupational tax on all persons who were liable to pay the excise tax on commercialized gambling, namely, persons who are “engaged in the business of accepting wagers.”

The reported decisions of the Fifth Circuit cited above confirm that the statutes in question and the taxes in question were intended to apply only to commercialized gambling and the persons who are engaged in that business. It is to be noted that the House and Senate reports include the statement that “commercialized gambling holds the unique position of being a multibillion dollar nationwide business. . . .”

It is also clear from the House and Senate committee reports and from the provisions of the law that neither the excise tax nor the occupational tax should apply to “the purely social or friendly type of bet” nor to those persons who indulge themselves in such bets.

The decisions reported to date, construing the specific laws in question, confirm this position but they do not provide us with a definition of just what is “commercialized gambling.”

Appellant submits that in our search for the definition of “commercialized gambling” the Congress has provided us with a guide when it has decreed that the persons liable for the tax are those persons who are “*engaged in the business*” of accepting wagers. Section 3285(d) Internal Revenue Code 1939 provides as follows:

“(d) Persons liable for tax. Each person who is *engaged in the business* of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. . . .” (Emphasis added.)

### **The Meaning of “Engaged in Business.”**

The statutes which the appellant has been convicted of violating are provisions of the Internal Revenue Code and are designed to impose a tax on the “multibillion dollar nation-wide business” of commercialized gambling. The statute imposes two taxes: one an excise tax upon the amount of the wagers, and the other a special occupational tax upon the persons who are engaged in the business of accepting such wagers. Purely social or friendly types of bets are specifically excluded in the language of the Congressional Reports and by necessary implication are excluded in the statutes.

The language used in Section 3285(d) has a clear, definite and well established meaning in our laws in the decisions of our courts and in everyday usage. The term “business” as used in the Internal Revenue Code was first defined by the Supreme Court of the United States in *Flint v. Stone Tracy Co.* (1910), 220 U. S. 107, 171, 55 L. Ed. 389, 421, as follows:

“‘Business’ is a very comprehensive term and embraces everything about which a person can be employed. Black’s Law Dict. 158, citing *People ex rel.*



Hoyt v. Tax Comrs. 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273."

That definition by the Supreme Court was later repeated, affirmed and enlarged by the Supreme Court of the United States in *Von Baumbach v. Sargent Land Co.* (1916), 242 U. S. 503, 514, 61 L. Ed. 460, 467, as follows:

"Were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what it was to do business, and this court adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business' 'that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.'"

The above definition of "business" has been adopted by the United States Court of Appeals for the 9th Circuit and has been quoted and referred to in numerous of the decisions of this Court. Among them the appellant respectfully invites the attention of the Court to the following:

*Richards v. Commissioner* (9th Cir., 1936), 81 F. 2d 369, 371-372;

*Section Seven Corp. v. Anglim* (9th Cir., 1943), 136 F. 2d 155, 157-158;

*San Fernando M. Land Co. v. Commissioner* (9th Cir., 1943), 135 F. 2d 547, 549;

*United States v. Hercules Mining Co.* (9th Cir., 1941), 119 F. 2d 289, 290-291.

The same rule is established in each of the other Circuits. Representative cases are as follows:

*Foss v. Commissioner* (1st Cir., 1935), 75 F. 2d 326, 327;

*United States v. Warren R. Co.* (2nd Cir., 1942), 127 F. 2d 134, 137;

*Helvering v. Wilmington Trust Co.* (3rd Cir., 1941), 124 F. 2d 156, 158;

*Harrisburg Hotel Co. v. United States* (3rd Cir., 1944), 145 F. 2d 116, 118;

*Cecil v. Commissioner* (4th Cir., 1939), 100 F. 2d 896, 898;

*Burk v. United States* (5th Cir., 1943), 134 F. 2d 879, 881;

*Dunlap v. Oldham Lbr. Co.* (5th Cir., 1950), 178 F. 2d 781, 784;

*Employers Liability, etc. Co. v. Accident Casualty Co., etc.* (6th Cir., 1943), 134 F. 2d 566, 568;

*Kales v. Commissioner* (6th Cir., 1939), 101 F. 2d 35, 37;

*Roseland v. Phister Mfg. Co.* (7th Cir., 1942), 125 F. 2d 417, 419, 139 A. L. R. 1013;

*Walker v. United States* (8th Cir., 1937), 93 F. 2d 383, 391;

*Kelley v. United States* (10th Cir., 1953), 202 F. 2d 838, 841;

*Hazen v. National Rifle Ass'n.*, (App. D. C., 1938), 101 F. 2d 432, 437-438.

The same rule is established and binding in the Courts of the State of California. For example:

*Union League Club v. Johnson* (1941), 18 Cal. 2d 275;

*City of Los Angeles v. Cohen* (1954), 124 Cal. App. 2d 225, 288, 268 P. 2d 183;

*Mansfield v. Hyde* (1952), 112 Cal. App. 2d 133, 137-138, 245 P. 2d 577.

See also:

12 C. J. S. p. 767 and cases collected there.

The phrase defining the persons subject to the tax, "engaged in the business", likewise has a clearly established meaning in the law. In addition to the significance derived from the word "business" the words "engaged in" add the additional requirement that the particular activity referred to be one characterized by an element of continuity or habitual practice. It has been established that the words "engaged in" eliminate those instances in which the activity is disconnected or in which there are very few instances of the activity. In this connection, see *Supreme Malt Products Co. v. United States* (1st Cir. 1946), 153 F. 2d 5, 6 and also see those cases collected at 14A Words & Phrases, p. 188 *et seq.*

In view of the foregoing it is interesting to consider the evidence against this appellant against the background of what the courts have established to be necessary before one is "engaged in a business."

In the first place the decisions establish that a "business" requires as an element that it be an activity engaged in for the purpose of making a livelihood or a profit. In the case at bar it has been established that the appellant, a

man of 64 years, is and for many years has been actively employed as the supervising manager of numerous clubs, restaurants and bars and that at the time of the alleged offenses he was actively engaged in operating six such clubs and restaurants. Indeed, one of the witnesses testified [Tr. p. 199] that at the time Mr. Kahn was supervising 5 or 6 night clubs or bars in the neighborhood and that he was gone from (the Club Royal) more than he was there. Since the alleged wagering activity complained of took place at the Club Royal we submit that this fact is not consistent with the appellant's being engaged in the business of accepting wagers.

Of equal importance, we submit, is the fact that although the Information covered the tax year from July 1, 1953, through June 30, 1954, the Government's evidence, taken at face value, is intended to establish wagering between the appellant and only one man, Hubert Ursich, unless it is conceded that the alleged bets of September 5, 1953, at Del Mar race track with witness Qualin are wagers, in which event there would be activity with 2 men. We submit that this fact is inconsistent with the appellant being engaged in the business of accepting wagers. If he were so engaged surely the Government would have produced evidence of a more substantial nature.

It is also interesting to note that, taken at face value, the government's evidence indicates a gross dollar volume of wagering for the tax year of \$6930.00 or \$5570.00, depending upon which interpretation of the facts is considered. Appellant submits that if he were engaged in the business of accepting wagers the government would have been able to produce more substantial evidence of a business activity.

Of probably greatest significance is the fact that the government's evidence has clearly established that during the time in question appellant's Club Royal and the surrounding area was a gathering place for the frequenters of card rooms and those who were interested in betting on the horse races and that although appellant tried to run the bookmakers out of his place from time to time without success he "tolerated them" and suffered them to carry on their calling within the Club Royal where, at times, there would be 5 or 6 or more bookmakers present soliciting bets from the patrons of the bar. This fact was established through the testimony of the government's witnesses as well as those of the defense. We submit that, if the appellant were "engaged in the business of accepting wagers," plain common business sense and judgment would require that he not permit his "competitors" to operate within his own place of business.

### **The Qualin Bets.**

It has been set forth above that the purported wagers with witness Qualin took place at Del Mar race track on September 5, 1953. [Tr. pp. 140-146.] Witness Qualin said, at the bottom of page 140, that he actually placed the bet at Del Mar race track but that he did not place it at the parimutuel window because he had not yet been paid so he approached Mr. Kahn for the money.

Appellant submits that, assuming this is true, the wagers would be excluded from the provision of the tax by those provisions of Section 3285(e), which provides:

"(e) Exclusions from the Tax. No tax shall be imposed by this subchapter, on any wager placed with, or on any wager placed in a wagering pool conducted by a parimutuel wagering enterprise . . ."

### Conclusion.

Appellant respectfully submits that even though the evidence produced by the government at his trial and admitted by the Court be given its full face value, it does not support a conviction for the offenses charged in the Information. The tax laws which appellant is convicted of violating are intended to impose and do impose excise taxes upon wagers handled by persons who are "engaged in the business" of accepting wagers, but upon those wagers only; they also impose a special occupational tax upon those persons who are engaged in the business of accepting wagers, but upon those persons only. The purpose of those laws, as established by the Congressional committee reports and those decisions reported to date, is to impose the above mentioned taxes on commercialized gambling. The evidence before the trial court and upon which this appellant was convicted failed wholly to establish that at the time in question, or at any other time, this appellant was "a person engaged in the business of accepting wagers." Therefore, the evidence does not support the finding of guilty and we submit that the judgment of the District Court should be reversed.

Respectfully submitted,

CHARLES H. CARR and  
GEORGE E. DANIELSON,

By GEORGE E. DANIELSON,

*Attorneys for Appellant.*

No. 15404.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

A. J. KAHN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

LAUGHLIN E. WATERS,  
*United States Attorney,*

LOUIS LEE ABBOTT,  
*Assistant U. S. Attorney,  
Chief, Criminal Division,*

LLOYD F. DUNN,  
*Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,  
600 Federal Building,  
Los Angeles 12, California,  
Attorneys for Appellee.*

FILED

MAY 23 1957

PAUL P. O'BRIEN, CLERK





## TOPICAL INDEX

### PAGE

Jurisdictional statement .....	1
Statement of the case.....	1
Statement of facts.....	1
Argument .....	4

### A.

The meaning of "engaged in the business of accepting wagers" .....	4
--	---

### B.

The evidence was sufficient to sustain the factual determination that the appellant was "engaged in the business of accepting wagers" .....	7
---	---

### C.

Qualin bets not excluded.....	8
Conclusion .....	9

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, cert. den. 344 U. S. 892.....	7
Karnuth v. United States, 279 U. S. 231, 49 S. Ct. 274, 73 L. Ed. 677.....	5
Pasadena Research Laboratories v. United States, 169 F. 2d 375, cert. den. 335 U. S. 853.....	7
Ramsey v. United States (9th Cir.), Mar. 27, 1957, No. 15094, Slip Sheet Op., p. 3,.....	7
United States v. Empire Packing Co., 174 F. 2d 16, cert. den. 337 U. S. 959.....	7
Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995 .....	7

### REGULATIONS

Regulations 132, 16 Fed. Reg. 11211 (26 C. F. R., 1940 Ed., Cum. Pocket Part Supp. 1954) Sec. 325.21.....	6
--	---

### STATUTES

United States Code Congressional Service, 1st Sess., 82d Cong., 1951, H. R. pp. 1838-1839.....	5
---	---

No. 15404.

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

A. J. KAHN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

**Jurisdictional Statement.**

The appellee concurs in the jurisdictional statement made by the appellant.

**Statement of the Case.**

The appellee concurs in the statement of the case made by the appellant.

**Statements of Facts.**

The appellee concurs in the factual statement made by appellant except that certain facts, set out *infra*, were omitted in that statement. The additional evidence should be considered in the determination of this appeal. As appellant concedes (Appellant's Br. p. 6) upon this review the Government is entitled to have this Court view the evidence in the light most favorable to it.

Appellant correctly states that there was specific evidence of wagering transactions with him totaling \$1,970.00 in September 1953 (Appellant's Br. p. 10). This included "the Qualin bets" (Appellant's Br. p. 25)

of \$900.00 which were placed with appellant at the Del Mar race track. [Tr. pp. 140-142.] The evidence showed additional betting activity in November 1953, which related to the question of whether appellant was "engaged in the business of accepting wagers". This was comprised of Exhibit 8 [Tr. pp. 51, 134] for \$620.00 and Exhibit 9 [Tr. pp. 52, 134] for \$200.00, admitted on the testimony of the witness Ursich.

In December, 1953 appellant concedes the evidence shows \$1,350.00 in wagers, and \$3,610.00 in March, 1954. These admissions were based on Exhibits in evidence. However appellant overlooked the testimony of betting activity on March 24 and 25, 1954, which did not have related documentary proof.

Ursich testified he lost \$2,300.00 to Kahn on March 24 [Tr. p. 68]. This was corroborated by the witness Zimmerman [Tr. pp. 174, 175, 185]. Ursich testified that he bet \$500.00 with Kahn on March 25 [Tr. p. 72] as well as an unspecified amount of additional bets [Tr. p. 71]. This testimony was likewise corroborated by Zimmerman [Tr. pp. 175, 176, 184]. The specific amounts for March 1954 therefore total \$6,410.00. This "action" was so important to appellant that he appointed a "professional gambler" [Tr. pp. 69, 179, 200] to handle it for him while he was enjoying a holiday at Las Vegas [Tr. p. 174]. In that connection Zimmerman testified as follows:

"A. Well, he mentioned that he was going to Vegas for a couple of days.

Q. Now, you are referring to Mr. Kahn?  
A. Mr. Kahn, and would I do him a favor and take care of Mr. Ursich, in other words, take Mr. Ursich's bets while he was away.

Q. And what did you say in reply to that?  
A. I agreed to it." [Tr. pp. 172-173.]

Zimmerman and appellant had a long-distance telephone conversation, Los Angeles to Las Vegas, the morning of March 25th about Ursich's losses of the 24th [Tr. pp. 174-175]. On the afternoon of the 25th Ursich's betting activities occasioned an attempted Los Angeles to Las Vegas call from appellant's son, Yale Kahn, to appellant [Tr. p. 176], and a successful telephone call from Zimmerman to appellant from Los Angeles to Las Vegas [Tr. p. 176].

Appellant had solicited Ursich's betting activity as far back as 1949 or 1950 [Tr. p. 74]. The witness Qualin testified:

"A. Yes. I made a lot of bets with Mr. Kahn.

Q. (By Mr. Dunn): When was the first time that you placed a bet with Mr. Kahn? A. I bet with Mr. Kahn in 1948, baseball." [Tr. p. 140.]

\* \* \* \* \*

"Q. Had you previously in the period, then, from July 1, 1953 until this day before Labor Day placed bets with Mr. Kahn? A. From '53 on, I mean that is the last bets I made. I mean I was through.

Q. And did you place the bets the Saturday before Labor Day? A. Yes sir.

Q. And you, from July 1, 1953, up until the two days before Labor Day, placed other bets with him?  
A. I might have, small bets." [Tr. p. 142.]

Ursich had placed bets "once or twice" for John Martinovich in 1953 or 1954 [Tr. pp. 74-75].

At the time the foregoing betting activity was taking place (totaling \$10,550.00 in seven months) appellant was earning a salary of \$500.00 a month [Tr. pp. 235-236].

## ARGUMENT.

### A.

#### The Meaning of “Engaged in the Business of Accepting Wagers.”

The appellant’s principal, if not only, point on appeal is that he was not shown to be “engaged in the business of accepting wagers”. Appellant concedes that the evidence was clearly of wagers between appellant and the witnesses (Appellant’s Br. pp. 14-15), not on behalf of any other person, and it follows that appellant was acting as the principal.

Appellant has briefed and presented to the Court the leading authorities as to what constitutes “engaging in business” under other statutes. We are here dealing with a new law, concerning which there are at this time few decided cases to help us. We think it is clear that there is sufficient evidence to sustain the conviction accepting the definition contended for by appellant, *i.e.*, commercialized gambling. We disagree, however, as did the trial Court, with his, conclusion that the wagers were of the friendly or sociable type.

Appellant in his brief has quoted the 1951 United States Code Congressional Service. We would like to continue with that quotation, since he has omitted some significant and helpful language therefrom:

“Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such wagers. The purpose of this requirement is to exclude from the tax the purely ‘social’ or ‘friendly’ type of bet. *A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account.* The

principals in such transactions are commonly referred to as 'bookmakers', although it is not intended that any technical definition of 'bookmaker', such as the maintenance of a handbook or other device for the recording of wagers, be required. It is intended that a wager be considered as 'placed' with a principal when it has been placed with another person acting for him. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners'. *It is not intended that to be 'engaged in the business of accepting such wagers' a person must be either so engaged to the exclusion of all other activities or even primarily so engaged.* Thus, for example, an individual may be primarily engaged as a salesman, and also, for the purposes of this tax, be engaged in the business of accepting wagers." (Emphasis supplied.)

U. S. Code Cong. Service, 1st Sess., 82nd Cong., 1951, House Report, pp. 1838-1839.

Particular attention is called to the emphasized portions of the foregoing Report. Here appellant did engage in accepting wagers as a principal of his own account. Although he may have been primarily engaged in the operation of the family chain of bars, it is submitted that he was also engaged in the business of accepting wagers.

In *Karnuth v. United States*, 279 U. S. 231, 243, 49 S. Ct. 274, 278, 73 L. Ed. 677, it was said:

"\* \* \* the case is therefore narrowed to the simple inquiry whether the word 'business', as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. \* \* \*"

(Emphasis supplied.)

The Treasury Department has issued regulations in connection with the wagering tax to explain the meaning. (See Regs. 132, 16 Fed. Reg. 11211, November 3, 1951, as reported in 26 C. F. R. (1940 ed., Cumulative Pocket Supplement for 1954) Sec. 325.21), which regulations read in part:

“(B) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.”

We submit that it is not necessary that to be liable under the statutes here involved a person be engaged in the business of accepting wagers to the exclusion of all other activities, or that it be his primary business, but that it is sufficient to prove that he is engaged in such activity as a principal, and is not merely making an occasional friendly or social wager. The House Report referred to *supra* so indicates, and the Treasury Department has given effect to this Report by virtue of the foregoing Regulation. It is further submitted that proof on the point that appellant was engaged in the business of accepting wagers is more than adequate.



B.

**The Evidence Was Sufficient to Sustain the Factual Determination That the Appellant Was “Engaged in the Business of Accepting Wagers.”**

The question as to whether appellant was “engaged in the business of accepting wagers” is a question of fact (*Cf. Ramsey v. United States* (9th Cir.), Mar. 27, 1957, #15,094, at page 3, slip sheet opinion) to be determined by the trier of fact, here the District Court, a jury having been waived [Tr. p. 15]. A specific finding of fact that appellant was so engaged during the times in question was made by the Court [Tr. p. 22]. The appellant now has the burden of showing that there was no substantial evidence to support the finding if he is to prevail on appeal.

It is well settled that the appellate court will not review questions of fact or weigh evidence, where there is any substantial and competent evidence to support a finding of guilt, that the court will take a view of the evidence most favorable to the government and will give the government the benefit of all inferences which reasonably may be drawn from the evidence.

*Woodward Laboratories, Inc., et al. v. United States*, 198 F. 2d 995, 998 (9th Cir. 1952);

*Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 380 (9th Cir. 1948), Cert. den. 335 U. S. 853.

The foregoing rules apply to Court trials also:

*C-O-Two Fire Equipment Co. v. United States*, 197 F. 2d 489, 491 (9th Cir. 1952), Cert. den. 344 U. S. 892;

*United States v. Empire Packing Co.*, 174 F. 2d 16 (7th Cir. 1949), Cert. den. 337 U. S. 959.

The facts, more fully set forth in the Statement of Facts, *supra*, are that from 1948 appellant was known to be a person who would book wagers. During the seven month period covered by the specifications of the Bill of Particulars, appellant booked at least \$10,550.00 in bets, an average of over \$1,500.00 per month. This was not a bad supplemental income for a man on a \$500.00 monthly salary. The business was so important to appellant that he employed Zimmerman, a professional gambler, to take the "action" while appellant was away. In carrying out the business while absent, appellant engaged in a couple of long-distance telephone calls about it. Appellant would now have us believe that this was just social betting. That fact issue was before the Court and was found contrary to appellant's position. Can it now be said that there was such a paucity of evidence on the point that this honorable Court should overturn the decision of the trial Court? We think not.

### C.

#### Qualin Bets Not Excluded.

The argument that the "Qualin bets" should be excluded is specious and hardly warrants mention. Appellant quotes the "Exclusions from the Tax" and the quotation clearly applies only to bets placed in the pari-mutuel pool whereas the plain meaning of the testimony was that appellant booked Qualin's bets because Qualin did not have the cash to bet through the parimutuel windows [Tr. pp. 140-141, 144].

### Conclusion.

There being substantial evidence on which the trial Court could find that appellant was engaged in the business of accepting wagers, it is respectfully requested that this honorable Court affirm appellant's conviction.

Respectfully submitted,

LAUGHLIN E. WATERS,

*United States Attorney,*

LOUIS LEE ABBOTT,

*Assist. U. S. Attorney,*

*Chief, Criminal Division,*

LLOYD F. DUNN,

*Assist. U. S. Attorney,*

*Assist. Chief, Criminal Division.*

*Attorneys for Appellee.*

12 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

1 1/2

No. 15404.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

A. J. KAHN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S REPLY BRIEF.

---

CHARLES H. CARR, and

GEORGE E. DANIELSON,

417 South Hill Street,  
Los Angeles 13, California,

*Attorneys for Appellant.*

FILED

JUN 4 1957

PAUL P. O'BRIEN, CLERK



## TABLE OF AUTHORITIES CITED

CASE	PAGE
Ramsey v. United States, 9th Cir., Mar. 27, 1957, No. 15094.....	3, 4

### STATUTES

65 Statutes at Large, p. 529.....	3
-----------------------------------	---

the carrying on of the business of a distiller and the possession of distilled spirits under certain circumstances. The particular language of this Court is found in the first portion of the last paragraph on page 3 of that opinion, as follows:

“Defendant argues that he did not unlawfully possess tax unpaid distilled spirits. *This is a question of fact.*” (Emphasis added.)

The facts of that case were reviewed by the Court in its opinion, on page 3, and conclusively established that the defendant in that case was found to be in possession of at least 40 gallons of distilled spirits and in possession of all of the necessary equipment and ingredients for distilling and rectifying liquor. There is no similarity whatever between the *Ramsey* case and the case at bar.

### Conclusion.

Appellant submits that all of the evidence in the case, viewed in the light most favorable to the appellee, fails to support the convictions of the offenses charged and that the judgment of conviction should be reversed.

Respectfully submitted,

CHARLES H. CARR, and

GEORGE E. DANIELSON,

By GEORGE E. DANIELSON,

*Attorneys for Appellant.*



No. 15408

---

**United States**  
**Court of Appeals**  
*For the Ninth Circuit*

---

GRACE & CO. (Pacific Coast),  
Appellant,  
vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,  
Appellee.

---

**Transcript of Record**  
**In Two Volumes**

---

**Volume I**  
**(Pages 1 to 270)**

---

Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.

**FILED**

APR - 1 1957

PAUL P. O'BRIEN, CLERK



No. 15408

---

United States  
Court of Appeals  
For the Ninth Circuit

---

GRACE & CO. (Pacific Coast),

Appellant,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,

Appellee.

---

Transcript of Record  
In Two Volumes

---

Volume I  
(Pages 1 to 270)

---

Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.

## Witnesses, Defendant's (Continued):

Robinson, Parker M.

—direct .....	357
—cross .....	399, 409

## Witnesses, Plaintiff's:

Gips, Cyril Gregory

—direct .....	115
—cross .....	177
—redirect .....	225

Hargos, Richard

—direct .....	313
—cross .....	331
—redirect .....	339, 340

Hartman, Frank

—direct .....	340
—cross .....	353
—redirect .....	355
—recross .....	355

Schlaugh, William H.

—direct .....	231
—cross .....	262
—redirect .....	308
—recross .....	310

## NAMES AND ADDRESSES OF COUNSEL

WALLACE, GARRISON, NORTON & RAY,  
2200 Shell Building,  
San Francisco 4, California, and

BOGLE, BOGLE & GATES,  
Central Building,  
Seattle 4, Washington,  
Attorneys for Appellant.

GRAHAM, GREEN & DUNN;  
BENJAMIN J. GANTT, JR.;  
FRANK T. ROSENQUIST,  
625 Henry Building,  
Seattle 1, Washington,  
Attorneys for Appellee.



United States District Court, Western District of  
Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast), a Corporation,  
Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,  
Defendant.

## COMPLAINT

The plaintiff alleges:

### I.

Plaintiff (formerly known as W. R. Grace & Co.) is a corporation incorporated under the laws of West Virginia, is qualified to do business in the State of Washington and has paid all license fees; and defendant is a corporation, incorporated under the laws of the State of Pennsylvania, and is qualified to do business in the State of Washington. The matter in controversy, exclusive of costs and interest, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

### II.

Defendant at all times material was and now is engaged in the business of performing expert and professional services in the testing, surveying, inspecting and certifying of machinery, machinery parts, steel and metals, concrete and materials of all kinds and in respect to the characteristics, stand-

ards, quantity, quality, conformance to specifications and chemical contents and analysis thereof, and hold themselves out as specialized engineers and chemists possessing all the knowledge and skills necessary for the conduct of such a business with laboratories and offices for the purpose of conducting said business in many cities, including Seattle, Washington, and San Francisco, California. On or prior to May 15, 1952, defendant held itself out as possessing sufficient knowledge and skill to inspect, advise and certify as conforming to specifications, 750 steel billets to conform to specifications A.S.T.M. (American Society Testing Materials) designation A.17/29 Type A, Grade 2, Size  $9\frac{1}{2}'' \times 4'' \times 4'0\frac{1}{2}''$ , and 50 steel billets to conform to specifications A.S.T.M., designation A.17/29 Type A, Grade 1, Size  $6'' \times 3'' \times 10'$ , to be manufactured according to the aforesaid specifications by the Seattle Foundry Co., Inc., at Seattle, Washington, pursuant to plaintiff's fulfilling and order and an agreement entered into with the New Zealand Government Trade Commissioner, Washington, D. C. acting on behalf of the Government of New Zealand, which steel billets were required for the manufacture of parts for locomotives.

### III.

Plaintiff having no knowledge concerning the characteristics or specifications of said steel billets, and relying upon defendant as having sufficient knowledge and skill to properly inspect and certify said steel billets to conform with said specifications and relying upon defendant's statement that it had



such knowledge and skill, made arrangements with the defendant at San Francisco, California, on about May 15, 1952, for the inspection and certifying of the aforesaid steel billets to satisfy itself that said steel billets complied and conformed to specifications, which arrangements were confirmed in writing by the following exchange of letters:

“May 20th, 1952;

“San Francisco, California.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM - A - 17/29,  
Type A, Grade 2, size  $9\frac{1}{2}'' \times 4'' \times 4\frac{1}{4}''$ .

“50 Billets, Specifications ASTM - A - 17/29,  
Type A, Grade 1, size  $6'' \times 3'' \times 10'$ .

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are,

“Very truly yours,

“W. R. GRACE & CO.,

“Export Department.

“CGG/ba.”

“May 21, 1952;

“San Francisco, California.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips, Export Dept.

“Subject: Inspection of Steel Billets for  
New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and

any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain,

“Very truly yours,

“PITTSBURGH TESTING  
LABORATORY,

“/s/ PARKER M. ROBINSON,  
“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle  
PTG.”

#### IV.

Defendant undertook to perform its aforesaid written agreement and between June 12, 1952, and September 3, 1952, inspected and furnished certificates of inspection that aforesaid 800 steel billets manufactured by Seattle Foundry Co., Inc., conformed to the aforesaid specifications A.S.T.M., designation A.17/29, and relying on defendant's inspection and certification, plaintiff accepted said material from Seattle Foundry Co., Inc., and delivered the same to the Government of New Zealand pursuant to the aforesaid order. Believing that defendant had fully performed its agreement to inspect and certify said steel billets, plaintiff paid the defendant the sum of Three Thousand One Hundred Fifty (\$3,150.00) Dollars, for said inspection and certification.

## V.

Defendant failed to properly inspect and certify said steel billets, and as a result, said steel billets, upon delivery, failed to conform and comply with the aforesaid specifications in the following particulars:

(1) Under standard specifications A.S.T.M., designation A.17/29, it is provided that "Billets shall be purchased as semi-finished rolled or forged material." Whereas said material inspected and certified to by defendant as complying with said specifications, were not billets of a semi-finished, rolled or forged material, but were ingots with sand adhering to their surfaces.

(2) Under standard specifications A.S.T.M., designation A.17/29, it is provided, "Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet." Whereas the materials inspected and certified to by the defendant were not billets made from ingots of at least three times the cross-sectional area of the billets, but were ingots of the same size as set forth as the dimensions in the said specifications.

(3) Under standard specifications A.S.T.M., designation A.17/29, it is provided that the steel conform to certain chemical composition for type and grade, whereas the material inspected and certified to by defendant in respect to phosphorous, sulphur and carbon contents were outside the range permissible in said specification.

(4) Under standard specifications A.S.T.M., designation A.17/29, it is provided "The Billets shall be free from injurious defects and shall have a workman-like finish," whereas the materials inspected and certified to by defendant, did not have a workman-like finish and were not free of injurious defects, but contained structural defects and blowholes contrary to said specifications.

VI.

As a direct result of defendant's failure to properly inspect and certify said material, plaintiff has been damaged in the approximate sum of Twenty-six Thousand (\$26,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant for said sum of Twenty-six Thousand (\$26,000.00) Dollars, together with interests and costs and disbursements to be taxed herein.

BOGLE, BOGLE & GATES;

By /s/ THOMAS L. MORROW,  
Attorneys for Plaintiff.

[Endorsed]: Filed June 8, 1954.

United States District Court, Western District  
of Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast), a Corporation,  
Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,

Defendant and Third-Party Plaintiff,

vs.

SEATTLE FOUNDRY CO., INC., a Corporation,  
and THOMAS H. WILLIAMS and CHARLES  
V. SMITH, Co-Partners, d/b/a NORTH-  
WEST LABORATORIES,

Third-Party Defendants.

## ANSWER OF DEFENDANT PITTSBURGH TESTING LABORATORY

Comes Now the Defendant, Pittsburgh Testing Laboratory, a corporation, and for Answer to Plaintiff's Complaint, admits, alleges and denies as follows:

### I.

Referring to Paragraph I of Plaintiff's Complaint, Defendant admits it is a corporation incorporated under the laws of the State of Pennsylvania and is qualified to do business in the State of Washington; Defendant is without knowledge and infor-

mation sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph I and, therefore, Defendant denies the same.

## II.

Referring to Paragraph II of Plaintiff's Complaint:

Defendant admits all of the allegations contained in the first sentence of said paragraph, except that defendant has no chemical laboratory in its Seattle, Washington, office.

Defendant denies each and every allegation of the second sentence of said paragraph, except that defendant admits and alleges that on or about May 16, 1952, defendant, through its San Francisco, California, office, agreed pursuant to an oral order by telephone from the San Francisco, California, office of W. R. Grace & Co. to inspect by sampling 800 cast steel billets to be manufactured by third-party defendant, Seattle Foundry Co., Inc., at its foundry in Seattle, Washington, 750 steel billets to conform to specifications A.S.T.M., designation A.17/29, Type A, Grade 2, Size  $9\frac{1}{2}'' \times 4'' \times 4' 0\frac{1}{2}''$ , and 50 steel billets to conform to specifications A.S.T.M., designation A.17/29, Type A, Grade 1, Size  $6'' \times 3'' \times 10'$ , subject, however, to the understanding with W. R. Grace & Co. that said billets were to be cast steel billets, rather than forged or rolled, since the Seattle Foundry Co., Inc., could not roll or forge steel; that third-party defendant Seattle Foundry Co., Inc., further confirmed and represented to de-

fendant that under the agreement Seattle Foundry Co., Inc., had with W. R. Grace & Co. cast steel billets manufactured by said foundry would be satisfactory to W. R. Grace & Co.; that the inspection and sampling would be done by defendant's Seattle office and chemical analysis would be made by defendant's San Francisco office; that subsequently third-party defendant Seattle Foundry Co., Inc., objected to the delay caused by the chemical analysis being done by defendant's San Francisco office and W. R. Grace & Co. agreed that defendant could provide for chemical analysis at the third-party defendant Northwest Laboratories at Seattle, Washington; that defendant was advised that said cast steel billets were going to the New Zealand Trade Commission, but defendant denies that defendant had any knowledge of the details of the order W. R. Grace & Co. had with the New Zealand Government Trade Commission.

### III.

Referring to Paragraph III of Plaintiff's Complaint:

Defendant admits, as set forth in Paragraph II hereof, that on or about May 16, 1952, W. R. Grace & Co., through its said San Francisco office, orally by telephone engaged defendant Pittsburgh Testing Laboratory, through its said San Francisco office, to inspect by sampling the cast steel billets referred to in Paragraph II of this Answer for compliance with the specifications as set forth in said Paragraph II hereof, subject, however, to the under-



standing with W. R. Grace & Co. that said billets were to be cast steel billets rather than forged or rolled billets, since the Seattle Foundry Co., Inc., could not roll or forge steel; defendant further admits receipt of the letter dated May 20, 1952, from W. R. Grace & Co., addressed to defendant, and defendant admits that its said San Francisco office sent the letter dated May 21, 1952, addressed to W. R. Grace & Co.

Except as hereinbefore admitted, defendant denies each and every allegation contained in Paragraph III of Plaintiff's Complaint.

#### IV.

Referring to Paragraph IV of Plaintiff's Complaint:

Defendant admits that W. R. Grace & Co. paid defendant the sum of Three Thousand One Hundred Fifty (\$3,150.00) Dollars for inspection by sampling in accordance with defendant's oral agreement to inspect cast steel billets, as set forth in Paragraph II of this Answer; defendant specifically denies that its Agreement with W. R. Grace & Co. was a written agreement, and denies that either W. R. Grace & Co. or plaintiff relied upon defendant's inspection and certification that said cast steel billets were rolled or forged or otherwise relied upon defendant's inspection and certification, and defendant further specifically denies that defendant certified that said cast steel billets were rolled or forged; defendant alleges that it fully and prop-

erly performed all its said undertaking under its said oral agreement with W. R. Grace & Co. to inspect by sampling said cast steel billets.

Defendant denies each and every other allegation contained in said Paragraph IV.

## V.

Defendant denies that it failed to properly inspect and certify said cast steel billets in accordance with its said oral agreement with W. R. Grace & Co., set forth in Paragraph II of this Answer, and denies that said cast steel billets failed to conform and comply with specifications of the said oral agreement for inspection. Defendant denies that it undertook to inspect and certify rolled or forged materials, and denies that the specifications referred to in subparagraphs 1, 2, 3 and 4 of Paragraph V of Plaintiff's Complaint were specifications included in defendant's said oral agreement with W. R. Grace & Co. to inspect cast steel billets.

## VI.

Referring to Paragraph VI of Plaintiff's Complaint, defendant denies that it failed to properly inspect and certify said cast steel billets, and defendant further denies that plaintiff has been damaged in the approximate sum of Twenty-six Thousand (\$26,000.00) Dollars or any other sum whatsoever.

By way of further answer, as a First Affirmative Defense, defendant alleges as follows:

### I.

Defendant realleges all of the allegations contained in Paragraph II of Defendant's Answer.

### II.

Defendant is informed and believes, and therefore alleges, that W. R. Grace & Co., prior to its oral agreement with defendant to inspect cast steel billets, negotiated with third-party defendant Seattle Foundry Co., Inc., relative to placing an order for said billets, and during said negotiations ascertained that said third-party defendant Seattle Foundry Co., Inc., offered to manufacture said billets much cheaper than other parties; and, further, that W. R. Grace & Co. made inquiry about, and was advised of and well aware of, the difference between forged, rolled and cast material, and at the time of the placing of its said oral order for inspection with defendant was advised and was well aware of the fact that the third-party defendant Seattle Foundry Co., Inc., had no facilities for rolling or forging steel and that it could only furnish cast steel billets.

### III.

That W. R. Grace & Co., through its representations and actions at the time that defendant agreed orally to inspect cast steel billets and by its representations and actions thereafter, led defendant to believe that cast steel billets was the material ordered by third-party defendant Seattle Foundry

Co., Inc., and which defendant was to inspect, and W. R. Grace & Co. and plaintiff are estopped from claiming that said material was to be rolled or forged material.

By way of further Answer, as a Second Affirmative Defense and as a Setoff, defendant alleges as follows:

I.

Defendant realleges all of the allegations contained in Paragraphs I, II and III of its First Affirmative Defense.

II.

That W. R. Grace & Co., through its representations and actions at the time that defendant agreed orally to inspect cast steel billets and by its representations and actions thereafter, led defendant to believe that cast steel billets was the material ordered by third-party defendant Seattle Foundry Co., Inc., and which defendant was to inspect, and if, in fact, rolled or forged material was required for plaintiff to fulfill its order and agreement with the New Zealand Government Trade Commissioner, Washington, D. C., acting on behalf of the Government of New Zealand, W. R. Grace & Co. not only failed to advise the defendant that the material was to be forged and rolled, but also indicated at all times that the billets were to be cast steel billets. That in so failing to advise defendant, if such were the case, W. R. Grace & Co. failed to exercise that care and competence in obtaining and communicating information to which defendant was justified

in expecting; and defendant justifiably relied upon the information, advice and actions of W. R. Grace & Co. that the billets were to be cast steel billets, and W. R. Grace & Co. and plaintiff are liable over to defendant for any harm or damages which defendant may suffer by reason thereof which would be the amount of any recovery which W. R. Grace & Co. or plaintiff might otherwise recover in this action against defendant.

Wherefore, defendant Pittsburgh Testing Laboratory prays that Plaintiff's Complaint be dismissed with prejudice and that said defendant have and recover its costs and disbursements herein to be taxed, and that said defendant have such other and further relief as to the Court may be just and equitable in the premises.

GRAHAM, GREEN, HOWE &  
DUNN;

/s/ BRYANT R. DUNN,  
Attorneys for Defendant, Pittsburgh Testing Laboratory.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1954.

---

[Title of District Court and Cause.]

### PRETRIAL ORDER

As the result of pretrial conferences heretofore held on September 26; October 20, 25 and 27; No-

vember 3, 9 and 10, 1955, in Room 612 of the United States Court House, Seattle, Washington, whereat the Honorable William J. Lindberg presided, the plaintiff Grace & Co. (Pacific Coast), also referred to herein as "Grace," was represented by Thomas L. Morrow and George N. Prince of Bogle, Bogle & Gates, its attorneys, and the defendant and third-party plaintiff Pittsburgh Testing Laboratory, also referred to herein as "Pittsburgh," was represented by Ben J. Gantt of Graham, Green & Dunn, and by James K. S. Ruby, its attorneys, and the third-party defendant Seattle Foundry Co., Inc., also referred to herein as "Foundry," was represented by Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner, its attorneys, the following issues of fact and law were framed and exhibits identified.

### Admitted Facts

The following are admitted facts herein:

1. The plaintiff Grace & Co. (Pacific Coast) was formerly known as W. R. Grace & Co., and plaintiff Grace & Co. (Pacific Coast) and W. R. Grace & Co. at all times material are one and the same corporation, incorporated under the laws of West Virginia and qualified to do business in the State of Washington, having paid its license fees to the State of Washington.

2. The matter in controversy, exclusive of costs and interest, exceeds the sum of \$3,000, and this court has jurisdiction of the said cause herein and jurisdiction of the parties herein.

3. The defendant and third-party plaintiff, Pittsburgh Testing Laboratory, is a corporation incorporated under the laws of the State of Pennsylvania and is qualified to do business in the State of Washington, with offices at San Francisco, California, and Seattle, Washington.

4. The third-party defendant, Seattle Foundry Co., Inc., is a corporation incorporated under the laws of the State of Washington, with its principal place of business at Seattle, Washington, and is engaged in the sale and manufacture of steel products.

5. The defendant and third-party plaintiff, Pittsburgh Testing Laboratory, at all times material was and now is engaged in the business of performing expert and professional services in the testing, surveying, inspecting and certifying of machinery, machinery parts, steel and metals, concrete and materials of all kinds, and in respect to the characteristics, standards, quantity, quality, conformance to specifications and chemical contents and analysis thereof, and hold themselves out as specialized engineers and chemists possessing all the knowledge and skills necessary for the conduct of such a business, with laboratories and offices for the purpose of conducting said business in many cities, including Seattle, Washington, and San Francisco, California, but does not have a laboratory at Seattle, Washington.

6. On about April 30, 1952, W. H. Schlauch of W. R. Grace & Co., Seattle, received an oral quota-

tion from Isaacson Iron Works, Seattle, quoting billets as specified.

7. In May, 1952, plaintiff Grace & Co. (Pacific Coast) sought the services of a firm qualified to inspect and certify steel billets ordered by the New Zealand Government Trade Commissioner in U.S.A., and upon making inquiry the defendant Pittsburgh Testing Laboratory was recommended to Mr. C. G. Gips of Grace & Co., San Francisco, as being qualified to inspect steel products at Seattle, Washington.

8. On July 24, 1952; July 25, 1952, and August 22, 1952, Seattle Foundry Co., Inc., submitted to W. R. Grace & Co., 408 White Building, Seattle, Washington, its invoices for steel products sold W. R. Grace & Co., which invoices were paid by W. R. Grace & Co., Seattle, by cancelled checks Nos. 4504, dated July 25, 1952, in the sum of \$5,517.78; 4507 dated July 28, 1952, in the sum of \$5,822.82; and 4703 dated August 28, 1952, in the sum of \$15,778.56, being plaintiff's Exhibit 36.

9. The Pittsburgh Testing Laboratory, Pittsburgh 30, Pennsylvania, Post Office Box 1646, submitted to W. R. Grace & Co., its invoices No. 62364 dated 6/30/52, No. 72099 dated 7/13/52, No. 82377 dated 8/30/52 and totaling \$3,151.86 for "Inspection of Steel Billets at Seattle Foundry Co., for shipment to New Zealand Government, Trade Commission," which invoices were paid by W. R. Grace & Co. on August 27, 1952; August 28, 1952, and May 19, 1953, respectively, said invoices being marked plaintiff's Exhibit 37.



10. The steel billets produced by Seattle Foundry Co. and ordered by W. R. Grace & Co. and inspected by Pittsburgh Testing Laboratory were shipped to the New Zealand Government Railways Department, Wellington, New Zealand, aboard the SS Waikawa under Bill of Lading No. 2, and aboard the SS Waiheni under Bill of Lading No. 3, said bills of lading being plaintiff's Exhibit 38, and were received in regular course at Wellington, New Zealand, by the New Zealand Government Railways during August and September, 1952.

11. W. R. Grace & Co., San Francisco, submitted its invoices Nos. M-2637 dated July 21, 1952, and M-2897 dated August 27, 1952, to the New Zealand Government Trade Commissioner, Washington, D. C., covering the sale of material delivered to the New Zealand Government Trade Commissioner under his Order No. US-1773, being plaintiff's Exhibit No. 39, and said invoices in the respective amounts of \$15,723.19 and \$21,739.45 were paid October 3, 1952, to W. R. Grace & Co. by the New Zealand Government Trade Commissioner, Washington, D. C.

12. The New Zealand Government Trade Commissioner incurred agency fees and ocean freight and other expenses in connection with the transportation of steel billets sold pursuant to New Zealand Government Trade Commissioner Order No. US-1773, as set forth in Union Steamship Company of New Zealand invoices dated August 15, 1952, and September 19, 1952, and B. R. Anderson & Co. in-

voices dated July 28, 1952, and August 28, 1952, in the respective amounts of \$13.80, \$19.05, \$1,939.49 and \$2,669.85 as set forth in plaintiff's Exhibit 40.

13. The terms "ASTM A-17/29," or "ASTM A-17-29," are the specifications set forth in plaintiff's Exhibit 41 or defendant's Exhibit A-28, said exhibits being true photographs of the American Society for Testing Materials, Standard Specifications for Carbon-Steel and Alloy-Steel Blooms, Billets and Slabs for Forgings published by the American Society for Testing Materials in 1930 covering pages 173 to 177, inclusive.

14. On August 26, 1954, W. R. Grace & Co. paid the claim of the New Zealand Government Trade Commissioner, Washington, D. C., arising out of New Zealand Government Trade Commissioner Order US-1773 by payment of the sum of \$21,747.24 by taking a release dated August 26, 1954, and receipt No. 3376 dated August 27, 1954, from the New Zealand Government Trade Commissioner, and by delivering its check No. 17513, and documents evidencing said payment are set forth in plaintiff's Exhibit 53.

15. The material sold to Grace by Foundry under Foundry invoices dated July 24, 1952, July 25, 1952, and August 22, 1952, being plaintiff's Exhibit 36, and inspected by Pittsburgh for Grace pursuant to services billed for under Pittsburgh invoices Nos. 62364 dated June 30, 1952, 72099 dated July 31, 1952, and 82377 dated August 30, 1952, being plaintiff's Exhibit 37, and purchased by and shipped to the

New Zealand Government Trade Commissioner under Order No. US-1773 did not meet the requirements of specifications ASTM A-17/29 and failed to comply with ASTM specifications in the following respects:

A. Under standard specifications ASTM designation A-17/29, it is provided that "billets shall be purchased as semifinished, rolled or forged material," whereas the 800 billets inspected and approved by defendant Pittsburgh were not a semifinished, rolled or forged material.

B. Under Standard Specification ASTM designation A-17/29, it is provided "a sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation," whereas the material sold by Foundry and inspected and approved by defendant Pittsburgh and sold and shipped to the New Zealand Government Trade Commissioner was not manufactured so as to provide a sufficient discard from each ingot to secure freedom from injurious piping and undue segregation.

C. Under standard specification ASTM designation A-17/29, it is provided "Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet," whereas the material sold by Foundry and inspected and approved by defendant Pittsburgh and purchased and shipped to the New Zealand Government Trade Commissioner was not billets made

from ingots of at least three times the cross-sectional area of the billet.

16. The only modifications, changes or amendments occurring after May 21, 1952, in the terms of agreement or terms of employment between plaintiff Grace and defendant Pittsburgh were as follows:

A. On or about June 10, 1952, Grace authorized defendant Pittsburgh Testing Laboratory to have the chemical analysis of the material ordered by plaintiff Grace from Foundry, and being inspected by defendant Pittsburgh, made at the rate of \$15 for each sample, the samples to be taken at Seattle, Washington, by Northwest Laboratories, in lieu of the San Francisco laboratory of defendant Pittsburgh, making the chemical analysis of samples at San Francisco at \$10 per sample. The request that sampling be done at Seattle instead of at San Francisco was made by Mr. James W. Murphy.

B. On or about July 21, 1952, Grace authorized and instructed Pittsburgh to accept eight steel billets under Foundry heat No. 41 which ran a manganese content of .85 instead of allowable limits of .50/.80 as provided for in the chemical requirements of ASTM A-17/29 specifications, and provided said steel billets met all other requirements of the order.

17. The 1951 index to ASTM standards shows A-17 "Discontinued—replaced by specifications A-273, and A-274."

18. The Seattle Foundry Co, Inc., in 1952 owned and operated a foundry in Seattle, King County, Washington; said foundry was equipped to cast steel only; said foundry had no facilities whereby it could forge or roll steel.

19. Foundry heats Nos. 1, 2, 3, 10, 14 and 15 were rejected by defendant Pittsburgh as shown in plaintiff's Exhibit 35 and defendant's Exhibit A-31 and were not included in material delivered to plaintiff Grace.

20. The plaintiff Grace at all times material was engaged in importing and exporting commodities and materials to and from the United States of America and foreign countries and in the regular course of business kept records of transactions in the form of business letters, documents and memoranda, and that plaintiff's Exhibits except 4, 21, 36, 38, 40, 41 and 56 to 63, inclusive, and 67, are records, or authentic copies of records of plaintiff Grace & Co. (Pacific Coast) made in the regular course of business at or near the time of the act, condition or event set forth in the said exhibits and letters and communications were duly sent and received in the regular course of its business.

21. The defendant, Pittsburgh, in the regular course of business kept records of transactions in the form of business letters, documents and memoranda and said defendant's Exhibits A-1, A-3, A-6 to A-11, inclusive, A-13, A-17, A-18, A-19, A-20 and A-31 are records, or authentic copies of records, of

defendant Pittsburgh made in the regular course of business at or near the time of the act, condition or event set forth in the exhibits and all exhibits of letters and communications were duly sent and received. Said defendant's Exhibits A-5, A-12, A-13, A-23, A-27, A-14, A-15, A-21, A-24 and A-26 are records or authentic copies of records of W. R. Grace & Co. made in the regular course of business, made at or near the time of the act, condition or event set forth in said exhibits.

22. Grace based its price quotation to the New Zealand Government Trade Commissioner for the bid on the billets upon the offer of Isaacson Iron Works, and Grace did not recompute its quotation to the New Zealand Government Trade Commissioner based upon the lower price bid from Foundry. Grace reserves an objection to the materiality and relevancy of these admitted facts.

23. Pittsburgh undertook to perform its agreement with Grace and inspected and furnished reports on the inspection of material produced by Foundry.

### Contentions in Grace vs. Pittsburgh

#### Contentions of Grace

#### (Grace vs. Pittsburgh)

1. On about May 15, 1952, defendant Pittsburgh held itself out to Grace as capable of inspecting steel billets to conform to ASTM A-17/29 specifications with the understanding that said steel billets were

to be manufactured at Seattle Foundry Co., Seattle, Washington, and to be sold to Grace for the purpose of Grace filling an order from the New Zealand Government Trade Commissioner for steel billets of ASTM A-17/29 specifications.

2. Plaintiff having no knowledge concerning the characteristics or specifications of said steel billets, and relying upon defendant Pittsburgh as having sufficient knowledge and skill to properly inspect and certify said steel billets to conform with said specifications, made preliminary arrangements with defendant Pittsburgh at San Francisco, California, on about May 15, 1952, for the inspection and certifying of the aforesaid steel billets. A written contract was then entered into by Grace and Pittsburgh by the following exchange of letters:

“May 20th, 1952,

“San Francisco, California.

“Pittsburgh Testing Laboratories,

“615 Howard Street,

“San Francisco 5, California.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our

Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM A-17/29,  
Type A, Grade 2, size  $9\frac{1}{2}''$  x  $4''$  x  $4' \frac{1}{2}''$

“50 Billets, Specifications ASTM A-17/29,  
Type A, Grade 1, size  $6''$  x  $3''$  x  $10'$ .

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“May 21, 1952,

“San Francisco, California.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips—Export Dept.

“Subject: Inspection of Steel Billets for  
New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets



to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING  
LABORATORY,

“/s/ PARKER M. ROBINSON,

“District Manager.

“Parker M. Robinson,

“bk

“cc: Seattle  
PTG”

3. Relying on Pittsburgh's contract to inspect and certify steel billets as conforming to ASTM A-17/29 specifications and relying upon services

rendered by Pittsburgh thereunder, Grace accepted said material from Seattle Foundry Co., Inc., and delivered the same to the Government of New Zealand.

4. Defendant failed to properly inspect and certify said steel billets, and as a result, said steel billets, upon delivery, failed to conform and comply with the aforesaid specifications in respects as set forth in paragraph 15 of the Admitted Facts and additionally as follows: Under standard specifications ASTM, designation A-17/29, it is provided, "The billets shall be free from injurious defects and shall have a workmanlike finish," whereas the materials inspected, approved and certified by defendant did not have a workmanlike finish and were not free of injurious defects, but contained structural defects and blowholes contrary to said specifications.

5. As a direct result of Pittsburgh's breach of contract, Grace has been damaged in the sum of Twenty-one Thousand Seven Hundred Twenty-four and 24/100 (\$21,724.24) Dollars, with legal interest at 6% per annum thereon from August 26, 1954, the date of payment of the claim of the New Zealand Government Trade Commissioner.

6. Grace further contends that:

(a) The aforesaid exchange of letters between Grace and Pittsburgh of May 20, and May 21, 1952, constituted an integrated written contract.

(b) Evidence of oral agreements or negotiations

between the parties prior to this written contract may not be received to vary its terms, and

(c) The terms of the contract are plain and may not be varied by parol evidence.

8. Grace further contends that Pittsburgh's duties under its contract with Grace were as follows:

(a) To inspect, approve and furnish a certificate of inspection of a product conforming strictly to the specifications of American Society of Testing Materials A-17/29.

(b) To refer to, consult and follow strictly ASTM A-17/29 specifications while performing services for plaintiff under the aforesaid inspection contract.

(c) To reject materials which failed to conform or comply with specifications ASTM A-17/29.

(d) To certify and report truthfully in respect to materials inspected and accepted by defendant Pittsburgh Testing Laboratory under the aforesaid inspection contract.

(e) To, in a field of specialized knowledge, exercise reasonable care, skill and diligence in the furtherance and advancement of the plaintiff's interest and to implicitly obey plaintiff's instructions.

(f) To advise Seattle Foundry of the requirements of ASTM A-17/29 specifications and insist on Foundry's conformance with specifications.

(g) To make known to plaintiff all material facts coming to defendant's knowledge concerning the subject of defendant's employment.

9. Grace further contends that the amount of \$21,747.24 paid by Grace to the New Zealand Government Trade Commissioner in settlement of its claim is prima facie evidence of the actual loss and damage sustained by Grace as a result of Pittsburgh's breach of its contract with Grace and that the burden of proof is upon Pittsburgh to show facts in mitigation of damages.

10. Grace denies the truth of contentions by Pittsburgh which are in conflict with Grace's contentions and particularly denies that Pittsburgh's contentions support any affirmative defense on a theory of modification, estoppel or negligence or any other valid defense or claim of right or action over against Grace.

11. In reference to Pittsburgh's affirmative defense of estoppel Grace contends that:

(a) Employees of Grace had no knowledge of the characteristics of steel billets or the requirements of ASTM A-17/29 specifications and no knowledge that the product manufactured by Foundry would not conform to ASTM A-17/29, but at all times material relied on defendant Pittsburgh to inspect, approve and certify steel billets so that the final product conformed to ASTM A-17/29 specifications.

(b) Pittsburgh knew or had reasonable means of ascertaining knowledge that the New Zealand Government Trade Commissioner's order with Grace called for steel billets conforming to ASTM A-17/29 specifications and were to be used in parts for the manufacture of locomotives in New Zealand.

(c) Pittsburgh knew or had reasonable means of ascertaining knowledge that Grace's order to Foundry called for a purchase of steel billets conforming to ASTM A-17/29 specifications and that Foundry at all times intended to produce and sell under its contract of sale a product conforming, without exception, to ASTM A-17/29 specifications.

(d) Pittsburgh knew or was charged with knowledge of the characteristics of steel billets and the requirements of specifications ASTM A-17/29, and was under a duty to Grace to inspect and approve material which conformed to specifications and reject material which failed to comply.

12. The contract (plaintiff's Exhibit 20) between Foundry and Grace is immaterial in Grace's action for breach of contract against Pittsburgh.

13. In the event the court considers the contract between Grace and Foundry to be material, then it is Grace's contention that:

(a) Said contract was a written integrated agreement dated May 16, 1952, the terms of which may not be varied by parol evidence.

(b) Grace and Foundry intended that their con-

tract (plaintiff's Exhibit 20) be the single written memorial between the parties.

(c) Foundry's invoices to Grace (plaintiff's Exhibit 36) confirm Foundry's intention to sell and Grace's intention to purchase steel billets conforming to ASTM A-17/29 specifications.

(d) The Foundry letter (plaintiff's Exhibit 23) of May 16, 1952, is parol evidence and inadmissible to vary the terms of Foundry's contract with Grace.

14. Grace further contends that negligence, if any, on its part is no bar to a recovery against Pittsburgh in this action for breach of contract.

#### Defendant Pittsburgh's Contentions (Grace vs. Pittsburgh)

1. On or about May 16, 1952, Grace, through its San Francisco office, orally by telephone advised Pittsburgh through its San Francisco office, that Grace had ordered from Foundry 750 cast steel billets size  $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$  to conform insofar as applicable to specifications ASTM designation A-17/29, Type A, Grade 2, and 50 cast steel billets  $6'' \times 3'' \times 10'$  to conform insofar as applicable to specifications ASTM A-17/29, Type A, Grade 1, to be manufactured by Foundry at its Seattle plant. At said time and during said telephone conversation Grace orally engaged Pittsburgh to inspect by sampling said cast steel billets for compliance with said specifications insofar as the same were applicable thereto and it was further understood that said

inspection by sampling would constitute inspection for the chemical requirements of specifications ASTM A-17/29 for surface defects and for size as ordered by Grace from Foundry. Grace further orally advised Pittsburgh that said cast steel billets were going to the New Zealand Government Trade Commission but Grace did not advise Pittsburgh as to any of the details of its order with the New Zealand Government Trade Commission. Grace in fact ordered cast steel billets from Foundry to fill its order with the New Zealand Trade Commission.

2. Foundry confirmed and replied to Pittsburgh that under the agreement Foundry had with Grace cast steel billets manufactured by Foundry would be satisfactory to Grace.

3. Pittsburgh fully and properly performed all of its said undertaking under its oral agreement with Grace to inspect by sampling said cast steel billets ordered by Grace from Foundry.

4. Grace, prior to its oral agreement with Pittsburgh to inspect cast steel billets, negotiated with Foundry relative to placing an order for said billets, and during said negotiations ascertained that Foundry offered to manufacture said billets much cheaper than other parties. Grace made inquiry about and was advised of and well aware of the difference between forged, rolled and cast material and at the time of the placing of its oral order with Pittsburgh was advised of the fact that Foundry

had no facilities for rolling or forging steel and it could only furnish cast steel billets.

5. Grace, through its representations and actions at the time Pittsburgh agreed orally to inspect cast steel billets, and by its representations and actions thereafter, lead Pittsburgh to believe that cast steel billets was the material ordered by Grace from Foundry which Pittsburgh was to inspect and plaintiff is estopped from claiming that said material was to be rolled or forged.

6. If rolled or forged material was required by Grace to fulfill its order and agreement with New Zealand Government Trade Commissioner, Grace not only failed to advise Pittsburgh that the material was to be forged or rolled, but also indicated at all times that the billets were to be cast steel billets. In so failing to advise Pittsburgh, if such were the case, Grace failed to exercise that care and competence in obtaining and communicating information to which Pittsburgh was justified in expecting, and Pittsburgh justifiably relied upon the information, advice and actions of Grace that the billets were to be cast steel billets and plaintiff is liable over to Pittsburgh for any harm or damages which Pittsburgh may suffer by reason thereof in the amount of any recovery which plaintiff may make in this action against Pittsburgh.

7. Grace through its own action, negligence or its desire to obtain a much larger profit than usual



itself created or brought about and is solely responsible for the claim of the New Zealand Government.

8. Grace computed its price quotation to the New Zealand Trade Commission (pursuant to invitation to bid) upon the price offer to manufacture of Isaacson Iron Works; such price offer of Isaacson Iron Works was substantially higher than the price offer later accepted by Grace of Seattle Foundry. Grace did not adjust its price after accepting the lower offer of Seattle Foundry but desired to obtain the much larger and unusual profit resulting from the difference. Such substantial difference in price, replies of other suppliers contacted and other information in Grace's possession was such as to have put Grace on notice that the Seattle Foundry Company offer to manufacture was for a different product than the offer to manufacture of Isaacson Iron Works. In fact, Grace was so aware and was on its guard but failed either purposely or otherwise to advise Pittsburgh of such information but to the contrary withheld such information from Pittsburgh and thus created and made possible the claim of the New Zealand Trade Commission. If such information had been furnished to Pittsburgh, as it should have been, Pittsburgh would have been adequately appraised of the fact that forged or rolled billets were required.

9. Since Grace ordered cast steel billets from Foundry, plaintiff has suffered no damages whatsoever.

10. If the court finds Pittsburgh breached its contract with Grace, Grace did not take reasonable steps to mitigate its damages, if any.

11. If the court finds Pittsburgh breached its contract with Grace, the proper measure of damages for said breach is the difference between the value to Grace of what Grace in fact ordered from Foundry and the value of what Grace received from Foundry. In no event should such damage include the additional profit which would result to Grace by reason of furnishing a cheaper product than that called for by the order from the New Zealand Trade Commissioner.

12. That plaintiff cannot recover any special damages arising out of the resale contract with the New Zealand Government Trade Commissioner unless plaintiff can prove that Pittsburgh knew there was no ready supply of steel in the market from which the resale contract could be fulfilled and that the material was ordered by the New Zealand Government Trade Commissioner for locomotive motion parts and coupler heads.

13. Pittsburgh orally advised Grace at the time Grace orally engaged Pittsburgh to inspect 800 cast steel billets that cast steel billets did not meet the specifications of ASTM A-17/29 and Grace advised Pittsburgh at said time and lead Pittsburgh to believe that cast steel billets was the product that had been ordered by the New Zealand Government Trade Commissioner.

Issues of Fact Between Grace and Pittsburgh

1. What are the terms of the contract between Grace and Pittsburgh?

2. Did Pittsburgh comply with or breach the terms of its contract with Grace?

3. If material to the issues between Grace and Pittsburgh, what were the terms of the contract between Grace and Foundry and did Foundry comply with the terms of its contract with Grace?

4. What damages did Grace sustain, if any, as a result of the alleged breach of contract by Pittsburgh?

5. If Grace was required by law under the facts of this case to mitigate damages, what steps did Grace take in mitigation of damages?

6. What conduct of Grace, if any, occurred and was justifiably relied upon by Pittsburgh which estops Grace from asserting its claim against Pittsburgh?

7. Did Grace disclose to Pittsburgh all the facts and information in its possession prior to or at the time of making its agreement with Pittsburgh, or thereafter, which should reasonably have been disclosed to one furnishing services of the character of which Pittsburgh was furnishing? Grace objects to the inclusion of the foregoing statement as an issue of fact, and its objection is hereby reserved until the time of trial.

## Issues of Law Between Grace and Pittsburgh

1. What law governs the interpretation and construction of the contract between Grace and Pittsburgh?

2. What was the contract between Grace and Pittsburgh?

(a) Was it oral, or in writing?

(b) Was said contract an integrated written contract?

(c) Is parol evidence admissible to explain or vary the terms of the contract?

3. Did Pittsburgh breach its contract with Grace and, if so, is Pittsburgh liable to Grace?

4. Is the contract between Grace and Foundry material in the issues between Grace and Pittsburgh and, if so, what was the contract and was it complied with?

5. Under the facts of this case is Grace estopped from asserting its claim against Pittsburgh?

6. Assuming Grace's order from the New Zealand Government Trade Commissioner required billets to be rolled or forged, did Grace fail to exercise that care and confidence in obtaining and communicating information to which Pittsburgh was justified in expecting? If so, does this relieve Pittsburgh of liability? Grace objects to the inclusion of the foregoing statement as an issue of law, and its objection is hereby reserved until the time of trial.

7. What is the measure of damages for Pittsburgh's breach of contract with Grace, if any? If Pittsburgh is liable in damages to Grace, was Grace under a duty to mitigate damages and, if so, upon whom is the burden of showing mitigation?

### Stipulations

I. Issues of law and of fact which may arise during the course of the trial are hereby reserved by the parties.

II. Objections to written interrogatories addressed to G. S. J. Reed and to D. F. Tomalin shall be limited to those objections of Pittsburgh heretofore served and filed, except Pittsburgh Testing Laboratory waives its objections IX to interrogatory No. 20 to the Reed deposition. The defendant Pittsburgh reserves its right to object to the materiality, relevancy, hearsay and responsiveness of the answers to said interrogatories and cross-interrogatories. This stipulation supersedes the stipulation of the parties of September 9, 1955.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties upon order of the court or in the interest of substantial justice.

Dated at Seattle, Washington, this 29th day of November, 1955.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

Approved:

BOGLE, BOGLE, & GATES,

By /s/ GEORGE N. PRINCE,  
Attorneys for Plaintiff  
Grace & Co.;

GRAHAM, GREEN & DUNN,

By /s/ BEN J. GANTT, JR.,  
Attorneys for Defendant and Third Party Plaintiff  
Pittsburgh;

SAVAGE, GAINER &  
LECHNER,

By /s/ ROBERT L. LECHNER,  
Attorneys for Third Party  
Defendant Foundry.

[Endorsed]: Filed November 29, 1955.

---

[Title of District Court and Cause.]

### MEMORANDUM DECISION

This is an action by Grace & Co. (Pacific Coast), a corporation, as plaintiff against Pittsburgh Testing Laboratory, a corporation, as defendant. Jurisdiction is based upon diversity of citizenship. The

defendant, Pittsburgh Testing Laboratory, filed a third party complaint against Seattle Foundry Co., Inc., a corporation, and Thomas H. Williams and Charles V. Smith, co-partners, doing business as Northwest Laboratories, third party defendants. Thomas H. Williams and Charles V. Smith, doing business as Northwest Laboratories, were dismissed from the case after pretrial hearing. By oral decision from the bench the action against Seattle Foundry was dismissed after trial although no findings or order has been entered. This memorandum opinion relates only to the principal action of Grace & Co. against Pittsburgh Testing Laboratory.

This memorandum opinion is intended primarily for the information of the parties involved in the action rather than for publication and therefore it would seem unnecessary to outline all the facts and contentions of the parties. They will be referred to so far as is necessary as the court proceeds with the opinion. In the course of this opinion Grace & Co. (Pacific Coast), will be referred to as "Grace"; the defendant, Pittsburgh Testing Laboratory, a corporation, as "Pittsburgh"; the Seattle Foundry Co., Inc., as "Foundry" and New Zealand Government Trade Commission as "New Zealand." Grace alleges a breach of contract and seeks damages. The principal questions to be decided in this litigation are:

(1) What were the terms of the contract between Grace and Pittsburgh?

(2) Did Pittsburgh breach the contract? And

(3) In the event Pittsburgh did breach the contract, what recoverable damage, if any, did Grace sustain as a result thereof?

Grace contends that the contract is represented by the content of two letters exchanged between the parties which constitutes an unambiguous and fully integrated written contract. The letters are in evidence as Exhibits 21 and 22 and read as follows:

“May 20th, 1952.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

750 Billets, Specifications ASTM-A-17/29, Type A, Grade 2, size  $9\frac{1}{2}$ " x 4" x 4'  $1\frac{1}{2}$ ".

50 Billets, Specifications ASTM-A-17/29, Type A, Grade 1, size 6" x 3" x 10'.

which are to be delivered to us between August 15th and September 15th, 1952. Suppliers have already



been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“May 21, 1952.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California

SF 5799

“Attention: Mr. C. G. Gips—Export Dept.

“Subject: Inspection of Steel Billets for  
New Zealand

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping samples to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING  
LABORATORY,

“/s/ PARKER M. ROBINSON,  
“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle

“PTG”

Pittsburgh contends that the contract between the parties resulted from telephone conversations carried on between Gips, representing Grace, and Clark, representing Pittsburgh, and that the letters—Exhibits 21 and 22—are merely memoranda which do not constitute an integrated contract. Pittsburgh further contends that even should it be found that the letters constitute an integrated contract it is ambiguous and therefore its terms may be explained or interpreted by resort to extrinsic or parol evidence.

The contract having been entered into in California although calling for performance in the State

of Washington the law of California is applicable and controlling in deciding its terms, validity and breach. *Weber Showcase & Fixture Co. v. Waugh*, 42 F. 2d 515; *Williams v. Steamship Mutual Underwriting Ass'n*, 45 W. 2d 209; *Bertonneau v. Southern Pacific Co.*, 17 Cal. App. 439, 120 P. 53. The statutes of California which would appear to have particular bearing on the first question for decision are Sections 1625 and 1639 of the California Civil Code, which read as follows:

“Sec. 1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”

“Sec. 1639. When a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone, if possible subject, however, to the other provisions of this title.”

and Sections 1856 and 1860 of the California Code of Civil Procedure as follows:

“Sec. 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the

agreement other than the contents of the writing, except in the following cases:

“1. Where a mistake or imperfection of the writing is put in issue by the pleadings

“2. Where the validity of the agreement is the fact in dispute.

“But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.”

“Sec. 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.”

The foregoing sections of the California statutes have been construed many times by both the California State Courts and the federal courts. Counsel for the parties in lengthy briefs have brought to the court's attention many cases setting forth the application of the law. Reference is made to but a few.

Wells v. Wells,

(Cal App.) 169 P. 2d 23;

Love v. Gulyas,  
(Cal. App.) 197 P. 2d 405;

Kreuzberger v. Wingfield,  
(Cal.) 31 P. 109;

El Zarape Tortilla Factory v. Plant Food  
Corp. (Cal. App.), 203 P. 2d 13;

Wells Fargo Bank & Union Trust Co. v. Mc-  
Duffie (9 Cir.) 71 F. 2d 720.

The difficulty we meet in this case is the usual one of applying the law to the facts.

At the outset the court is confronted with the application of the so-called "parol evidence rule." The California law, both statutory and by decision, requires that the rule be strictly adhered to. *Gandelman v. Mercantile Ins. Co. of America*, 187 F. 2d 654.

In considering the initial issue as to whether the letters or exchange of letters referred to above constituted an integrated written contract between the parties, which issue must be decided before the terms of any agreement can be defined, reference is made to the well-put statement of the applicable rule set forth in Section 228 of the Restatement of the Law, Contracts, as follows:

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."

In the comment following said section it is stated that:

“It is an essential of an integration that the parties shall have manifested assent not merely to the provisions of their agreement, but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. If such assent is manifested the writing may be a letter, telegram or other informal document. That a document was or was not adopted as an integration may be proved by any relevant evidence.”

While the writings themselves are not controlling in determining whether there was an assent that they constitute a final statement of the parties' intention they are entitled to great weight if the language thereof does tend to establish such an assent. Obviously here such assent is not stated in so many words as might be expected in a formal contract.

However, considering the opening phrase of the letter (Exhibit 21), “We hereby confirm conversations between your Mr. Parker M. Robinson and our Mr. C. G. Gips” and the language immediately following, “and we hereby request that you make inspection and deliver certificate of inspection for the following material,” it seems reasonable to construe that language as not only a recognition by Grace of their earlier telephone conversations but also an indication that any agreement reached is now being incorporated in substance by the request contained in the letter. Referring to the reply from

Pittsburgh (Exhibit 22) after acknowledging Grace's letter authorizing inspection of 800 steel billets, the second paragraph of the letter begins by stating, "As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses"; etc. This language while not directed to all the terms of the agreement would indicate that Pittsburgh likewise recognized their earlier oral conversations and the language used is consistent with an assent that the letter or writings contain the substance of their preliminary agreements. At least a reasonable interpretation of the language contained in the letters certainly is not inconsistent with a finding that the parties approved the letters as a final statement of their intention as to the matters contained therein.

When the writings are left in search of some indication of the parties' intention with respect to the letters constituting a final statement of their agreement the evidence as to the conduct of the parties and the surrounding circumstances is not particularly helpful on the narrow issue now being considered with one important exception—the notes made by Parker M. Robinson. These notes (Exhibit 67), according to Robinson's testimony, were made by him on May 16, 1952, as a result of a conference with Clark immediately after a telephone conversation between Clark and Gips. Whether so made or whether made as a result of a conference or conversation directly with Gips they contain the significant entry that "Gips will give us a letter." This

evidence would tend to corroborate an interpretation of the language used in the writings themselves that the parties intended that the letters would cover their preliminary oral agreement for services to be rendered by Pittsburgh. It is the conclusion of the court, therefore, that not only the writings themselves but also the conduct of the parties and the surrounding circumstances establish that the parties assented to the letters as a final statement of their agreement. Having so concluded the letters otherwise appear to meet the requirements of a contract.

As to the requirements of a binding contract we find the following statement in 12 Am. Jur., Contracts, §12:

“To be binding, an agreement must be made by competent parties who express definite assent in the form required by law. The agreement must also be supported by a sufficient consideration, must not at the time it is made be obviously impossible of performance, and must not contravene principles of law or public policy so as to be void instead of merely voidable. A subject matter upon which the agreement can operate is sometimes required by statute.”

Here we have a writing complete as to every essential of a contract—parties, assent, form, consideration, subject matter and feasibility of performance. See Restatement of the Law, Contracts, §19, page 24; *Asbury v. Yakima Milling Co.*, 137 Wash. 203, 242 P. 362.



Accepting the letters as a written integrated contract, does it cover the whole transaction or is it so uncertain or ambiguous in its terms as to make it subject to interpretation by resort to extrinsic or parol evidence? It is Pittsburgh's contention that it was orally agreed between Gips and Clark that the inspection would be made of cast steel billets. Pittsburgh argues first that this element of the agreement was not covered by the exchange of letters, and second, that the language of the letters or writings is not clear as to this feature and therefore that the writings are ambiguous and uncertain and under the parol evidence rule the actual subject matter of the contract may be established by extrinsic or parol evidence. They rely on Sections 1856 and 1860 of the California Code of Civil Procedure, *supra*, and the application of these statutes as set forth in *Love v. Gulyas*, (Cal. App.) 197 P. 2d 405; *Wells v. Wells*, (Cal. App.) 169 P. 2d 23, and other California cases.

The rule to be applied in determining this issue is set forth in *Wigmore on Evidence*, 3rd ed., Sec. 2430, the applicable portion of which reads:

“The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject \* \* \* Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto \* \* \* This intent must be sought \* \* \* in the conduct and

language of the parties and the surrounding circumstances \* \* \* The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered \* \* \* In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstances whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation."

The general view is that the parol evidence rule is a matter of substantive law and not a rule of evidence. Wigmore on Evidence, 3rd ed., §2400; Producers Livestock Loan Company v. Idaho Livestock Auction, Inc., (9 Cir.) filed February 24, 1956, and as yet unreported. California has approved the rule of Wigmore as set forth above. Simmons v. California Institute of Technology, 34 Cal. 2d 264, 209 P. 2d 581.

It is abundantly clear from the evidence in this case that an oral agreement was entered into between Grace and Pittsburgh by virtue of the telephone conversations carried on between Gips, representing Grace, and Clark, representing Pittsburgh. It is clear likewise that this agreement called for

the inspection of billets that were ordered from and to be produced by Foundry in Seattle, Washington.

When we examine the letters—first Exhibit No. 21—we find that Gips refers to an inspection and the delivery of a certificate of inspection for the following “material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle.” Thereafter is set forth the specifications ASTM-A-17/29.

Pittsburgh’s letter in reply under date of May 21, 1952, opens with the language: “This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.” Bearing in mind the rule announced from Wigmore it would seem that the particular element of the alleged extrinsic negotiation is dealt with in the letters, the particular element being the “material” or “billets” here involved.

The court must conclude that the writing was intended to include the whole of the transaction.

As to Pittsburgh’s contention with respect to the ambiguity of the language of the letter contract, in Restatement of the Law. Contracts, §230, we find the following:

“The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a rea-

sonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

Following the standard of interpretation above set forth, the language of the letters or writings in this case when examined in the light of the evidence with respect to the conduct of the parties and the circumstances of the transaction would appear to leave no uncertainty or ambiguity such as would permit parol or extrinsic evidence to explain. When parties integrate their agreement and assent to the writings as an expression of matters to which they agree the terms of the writing are conclusive even if, as may be the case here, the contract may have a meaning different from that which either party supposed it to have. See Comment (b) Restatement of the Law, Contracts, §230.

The ambiguity which Pittsburgh urges, as the court understands their contentions, relates to the article to be inspected. As stated earlier Pittsburgh contends the product to be inspected was cast steel billets. However, when we confine our consideration to the language contained in the letters can we find any ambiguity with respect to the material that was to be inspected? It does not appear so. The material to be inspected apart from its precise nature was without dispute. It consisted of 800 billets ordered from Foundry in Seattle, Washington, under

the specifications set forth. In reality Pittsburgh's alleged ambiguity as it develops seems to be directed to the specifications rather than material to be inspected. Yet the standard or guide against which these billets were to be inspected was plainly set forth as Specification ASTM-A-17/29.

Pittsburgh also contends that in order to make the language of the letters clear and unambiguous as to the specifications to be followed it is necessary to insert the words: "As per" between the words "billet" and "specifications" appearing in the letter from Grace to Pittsburgh, (Exhibit 21). It would seem that a reasonable interpretation of the language set forth in the letter would imply as much without requiring the insertion of the words "as per" as suggested by Pittsburgh.

The evidence makes it clear that Gips at the time the agreement was entered into had little knowledge of steel and it is doubtful if he understood the difference between cast steel billets and billets as called for under the specifications set forth in his letter. Whether Gips should have had knowledge or taken the precaution of securing information as a matter of sound business practice is not in the opinion of the court material to the issue now under consideration. Gips had directed the Grace office in Seattle to secure bids on steel billets according to specifications contained in the New Zealand order. When the Foundry bid had been rechecked and verified by the Seattle office at Gips' request instructions were then sent to Seattle to place the order with Foundry.

Pittsburgh apparently contends that the terms of the contract between Grace and Foundry have some bearing on the terms of the contract between Grace and Pittsburgh. However, Pittsburgh also takes the position that the terms of the Foundry contract were never disclosed to them and the court is unable to see under such circumstances how an ambiguity results with respect to the contract between Grace and Pittsburgh. Also the Grace-Foundry contract was negotiated in Seattle without direct participation by Gips. Therefore, aside from what may have transpired between Foundry and Grace with regard to the provisions or terms of the contract between them there is no evidence from which the court can find that Gips actually had in mind or intended any type of billet except such as would meet specifications ASTM-A-17/29, particularly at the time he was negotiating for the inspection services of Pittsburgh. William W. Clark of Pittsburgh on the other hand being a steel expert knew the difference between a cast steel and forged billet. Because of his wide and expert knowledge of the steel and foundry business on the west coast as well as elsewhere he immediately recognized the probability that Foundry could not manufacture billets other than cast steel billets and apparently assumed, as plaintiff contends he did, that the billets ordered and to be produced were such. Clark testified that in his telephone conversation with Gips he advised Gips that the specifications referred to were obsolete and that Seattle Foundry could make only cast steel billets. Accept-

ing Clark's version of the conversation with Gips such a conversation may tend to prove that Gips had or should have had notice of the limitations of Foundry's capacity to produce the billets in question but it does not follow that Gips had any appreciation of the significance of Clark's statement to that effect. It is quite probable that Clark as well as Robinson assumed that Gips had knowledge of the product they had agreed to furnish New Zealand and a realization of the fact that Foundry could produce only cast steel billets. It is understandable how Clark and Robinson may have been thus misled throughout the whole transaction into the belief that the billets to be inspected were cast steel billets. However, where there is an integration and under the parol evidence rule, this does not render the language of the letters ambiguous nor change the terms of the contract. The contract here involved called for inspection by Pittsburgh of material produced by the Foundry. The material was 750 billets of one grade and 50 billets of another. The specifications were set forth in the letter of Grace to Pittsburgh. If the specifications set forth in the letter had any meaning at all they meant that the billets ordered were to be inspected in accordance with the specifications set forth.

We now come to a determination of what those specifications were and what they meant. The specifications ASTM-A-17/29 as set forth in the official publication according to the interpretation of plaintiff's experts, Hargis and Hartman, call for billets

which have been forged or rolled subsequent to casting. As the court understands the testimony of Robinson and Clark they do not disagree with plaintiff's experts on this issue, if it is assumed that the material involved was not by understanding of the parties "cast steel billets." Certainly there is no language in either one of the letters which states that the material ordered or to be produced is to be cast steel billets. The specifications as set forth in Grace's letter of May 20, 1952 (Exhibit 21), is in the language used in the purchase order of New Zealand, Exhibit 11, and also in the letter of May 15, 1953, from New Zealand to Grace, making claim because of the faulty billets. It is reasonable to assume that Gips when he prepared his letter to Pittsburgh took the description of the billets right from the order he had received from New Zealand. The court does not see under the circumstances how a more definite description of the standard against which the inspection was to be made could be expected. When this language is interpreted without reference to any assumption or without any preconceived idea of what it refers to Robinson agrees that it calls for forged billets. This is indicated by his letter to Grace under date of June 9, 1953 (Exhibit 49), wherein he states as follows:

"By a strict interpretation of ASTM specification A-17/29, sand cast billets without subsequent rolling or forging would not comply."

It is the opinion of the court, therefore, that the integrated contract between Grace and Pittsburgh arising from the exchange of letters was not ambigu-



ous and may not be interpreted by resort to parol or extrinsic evidence.

The next question is, did Pittsburgh breach the contract? It seems unnecessary to consider all the requirements of specification A-17/29 or enter into a detailed discussion of all the obligations of Pittsburgh under the contract. It seems sufficient to say that the contract called for an inspection of billets in accordance with specifications ASTM-A-17/29, Type A, which specification called for forged billets, or to put it more accurately, billets which are forged or rolled subsequent to casting, as distinguished from cast steel billets which are not so forged or rolled. Foundry admittedly had no facilities to forge or roll billets. Pittsburgh in making its inspection reports at no time sought to advise Grace that the billets produced by Seattle Foundry were cast steel billets rather than billets that had been forged or rolled subsequent to casting as called for in the specification. Pittsburgh contending as they do that the material to be inspected under the contract was to consist of cast steel billets cannot seriously contend that they complied with the terms of the contract if the terms of the contract are found, as the court has found, to call for forged or rolled material. While it is contended in substance that Pittsburgh orally advised Grace at the time Gips by telephone engaged Pittsburgh to inspect the cast steel billets that cast steel billets produced by Seattle Foundry would not meet the specification ASTM-A-17/29 and that therefore Grace performed its con-

tract in this regard at that time, such action cannot in the court's opinion be substituted for performance of the terms of a written contract subsequently made.

It is the finding of the court, therefore, that Pittsburgh failed to inspect in compliance with the specifications as set forth in the contract. By so doing they failed to reject materials which did not conform to specifications. Their certification was not as required by the terms of the contract and said contract was thereby breached, resulting in damage to the plaintiff Grace. With respect to Pittsburgh's contentions as to estoppel and negligence on the part of plaintiff which would serve to deny recovery it is sufficient to state that under the evidence and applicable law in this case the contentions appear to be wholly without merit with respect to the first two issues already considered, namely, what were the terms of the contract, and was it breached?

### Damages

Having found that Pittsburgh breached its contract with Grace the remaining question is, what damages are recoverable?

Grace admittedly paid Foundry \$27,119.16 for the billets produced under their contract, and Pittsburgh \$3,151.86 for inspection services under the contract already discussed.

Grace was paid under its contract with New Zealand \$37,462.64 for the billets produced by Foundry.

After claim was made by New Zealand against Grace a settlement was negotiated after notice of the claim was given by Grace to both Pittsburgh and Foundry, whereby Grace was allowed a credit of \$15,715.40 for the billets which were retained and payment of \$21,747.24 was made by Grace to New Zealand. Thus, Grace suffered a net out-of-pocket loss of \$14,555.62. As damages Grace seeks recovery of the amount of net loss plus the sum of \$7,192.60, representing profit that would have been realized had the billets produced by Foundry met the specifications and been accepted by New Zealand under its contract with Grace.

Pittsburgh contends that even assuming a breach of its contract with Grace only nominal damages are allowable because the loss suffered by Grace was not the proximate result of Pittsburgh's breach but rather the result of Grace's transaction with Foundry for either Grace contracted with Foundry for cast steel billets and received what they ordered or the contract was for billets in accordance with specifications and if so the loss is proximately attributable to Foundry's breach of its contract.

Counsel have cited many cases in support of their respective contentions. However, these cases are not particularly helpful. They show the application of the general rule of damages as applied to particular cases but few, if any, appear to establish precedent for a measure of damages to be applied to a situation such as presented here.

When the whole transaction is viewed, it is apparent that Grace's loss resulted from their failure to deliver to New Zealand billets in accord with the terms of their contract. The billets were not the type or quality Grace agreed to deliver because they were cast steel billets instead of rolled or forged billets as required under ASTM-A-17/29 specifications. Grace not being a manufacturer or producer of steel but an exporter, had to secure quotations on the billets desired from a producer. The matter was referred by the Washington, D. C., office of Grace, where negotiations with New Zealand were initially undertaken, to the San Francisco office for attention. Gips, who was handling the transaction for Grace in San Francisco, knew little about steel and made inquiry of an acquaintance, Gleason, without undertaking to find out just what the product involved was, as to producers who might be available to fill the order. The San Francisco office of Grace referred the matter to their Seattle office for bids. The Seattle office likewise knew little or nothing regarding the precise nature of the product upon which they sought bids. The first bid or proposal received was from Isaacson Iron Works, who under the evidence knew the nature of the product called for under the specifications set forth in the request for bids and could have produced the billets desired. Upon this proposal Grace quoted New Zealand a price and agreed to deliver the billets. Within a few days the Seattle office of Grace received a quotation from Foundry at a lower price. Under the evidence it appears that Foundry construed the request for

bids as including cast steel billets and quoted prices on that assumption. After the San Francisco and Washington, D. C., offices of Grace were advised of the lower price the Seattle office was requested to recheck with Foundry as to specifications and price and thereafter following telephone and telegraphic communication between the San Francisco and Seattle offices of Grace a letter dated May 16, 1952 (Exhibit 20), purporting to be the Contract of Purchase between Grace and Foundry, was sent Foundry by the Seattle office of Grace. The first paragraph of the letter reads:

“We confirm telephone conversation yesterday wherein we purchased the following Steel Billets for shipment 60/90 days:

“750 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 2, Size  $9\frac{1}{2}$ " x 4" x 4'  $\frac{1}{2}$ ", about 515# each at...\$120.00/2000#

“50 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 1, Size 6" x 3" x 10', about 604#, each at.....\$130.00/2000#”

The inspection services of Pittsburgh were sought by Gips after Grace had decided to purchase the billets from Foundry. The Grace-Pittsburgh written contract was negotiated following the contract referred to above between Grace and Foundry. The services of Pittsburgh were not sought to guide or advise Grace in placing their order or in awarding

their contract for the purchase of the billets involved.

Under the facts as they have been briefly outlined it would appear that the damages sought by Grace, apart from the compensation paid Pittsburgh, are the natural and proximate consequence of the breach of contract by Foundry, if such contract called for forged or rolled billets rather than cast steel billets, or in the event said contract did not so provide the natural and proximate consequence of Grace's failure to purchase billets that did meet the specifications of their contract with New Zealand. Can it be reasonably found they are also the proximate consequence of Pittsburgh's breach? See Sutherland on Damages, 4th ed. Section 45.

If the damages sought by Grace are recoverable from Pittsburgh it would appear that it must be under the rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Reprint, 145, whereby damages may be recovered if they are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.

It is to be noted that the case we have here is not similar to the usual one where the rule of *Hadley v. Baxendale* has been followed to allow recovery such as cases where a sub-contractor undertakes work for a prime contractor, knowing all the provisions and specifications of the principal contract, or those where a manufacturer or supplier contracts to de-

liver equipment or goods to meet the known requirements of the purchaser in connection with contemplated sales or other collateral contracts, such as might be the situation if Grace were seeking the damages involved from Foundry. Neither is the case similar to that of *School Dist. No. 172 v. Josenhans*, 88 Wash. 624, wherein the architect drew the plans and specifications, received bids, awarded the contract and made inspections.

The law of the place of performance governs the measure of compensation to be applied in the event of breach of contract. While the contract here involved was made in California the substantial part, if not all, of the performance occurred in the state of Washington and the law of Washington should apply. *Sutherland on Damages*, (4th ed.) Section 7; *Garcia & Maggini Co. v. Washington Dehydrated Food Co.* (9 Cir.) 294 Fed. 765.

In the comparatively recent case of *Dally v. Isaacson*, 40 W. 2d 574, the supreme court of the State of Washington states:

“(2) The general rule as to damages growing out of a breach of contract is stated in the early English case, *Hadley v. Baxendale* (1854), 9 Ex. 341, 354, 156 Eng. Rep. 151, as follows:

“ ‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered

either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.'

"It has been recognized in 1 Restatement, Contracts 509, § 330, as follows:

"'In awarding damages, compensation is given for only those injuries *that the defendant had reason to foresee* as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.' (Italics ours.)

"The rule has been adopted in this jurisdiction. *Sedro Veneer Co. vs. Kwapil*, 62 Wash. 385, 113 Pac. 1100; *Martinac vs. Bakovic*, 158



Wash. 193, 290 Pac. 747; *Lewis vs. Jensen*, 39 Wn. (2d) 301, 235 P. (2d) 312.

“(3) Consequential damages are a severe remedy for a breach of contract, for they may, in many instances, exceed the contract price of the goods sold. *Bavaria Inv. Co. vs. Washington Brick, Lime & Sewer Pipe Co.*, 82 Wash. 187, 144 Pac. 68. *Such a measure of damages is to be applied when, and only when, it is made to appear that it was within the contemplation of the parties that the specific damages sought would probably result from a breach of the contract.*” (Italics supplied by district court.)

The rule above set forth was followed and approved in the more recent case of *Lidral vs. Sixth and Battery Corp.*, 147 Wash. Dec. 750 at page 753.

Sutherland on Damages (4th ed.) Sec. 50, after quoting the rule of *Hadley vs. Baxendale* as set forth in the above quotation notes the following caution applicable to the rule:

“It is to be remembered that there is no relaxation of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed the same strictness exists to confine the recovery to the immediate consequences.”

In referring to the rule confining recovery to the damages naturally and proximately resulting from the breach of contract the author (Sutherland) was

referring to the general rule of damages set forth in Section 45 as follows:

“In an action founded upon a contract only such damages can be recovered as are the natural and proximate consequence of its breach; \* \* \* the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into. \* \* \* *an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of contract. The wrongdoer is answerable for all the injurious consequences of his tortious act, which, according to the usual course of events and general experience, were likely to ensue and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contracts the parties are not chargeable with damages on this principle.* Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts and were within the contemplation of the parties when the contract was entered into as likely to result from its nonperformance.”

(Italics supplied.)

This statement of the law by Sutherland was

cited and approved in *Lidral vs. Sixth and Battery Corp.*, *supra*.

The serious question presented here with respect to the damages claimed, apart from the application of the principle of proximate consequences, except for the claim for money paid Pittsburgh for services, is whether the specific damages resulting from the delivery of cast steel billets instead of rolled or forged billets as per Specification A-17/29 under the Grace contract with New Zealand as well as with Foundry were within the contemplation of both parties when the contract between Grace and Pittsburgh was entered into as likely to result from its nonperformance.

The statement of the law and reasoning by Justice Holmes in one of his early but often-cited opinions, *Globe Refinding Co. vs. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. ed. 1171, is helpful. It is quoted at length:

“When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage vs. Genning*, 1 Roll. R.

368; *Hulbret vs. Hart*, 1 Vern. 133. It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken the measure of damages generally is the same, whatever the cause of the breach. We have to consider therefore what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to

suppose that it assumed, when the contract was made.

“This point of view is taken by implication in the rule that ‘a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.’ *Grebert-Borgnis vs. Nugent*, 15 Q.B.D. 85, 92; *Horne vs. Midland Ry. Co.*, L.R. 7 C.P. 583, 591; *Hadley vs. Baxendale*, 9 Exch. 341, 354; *Western Union Telegraph Co. vs. Hall*, 124 U.S. 444, 456; *Howard vs. Stillwell & Bierce Manufacturing Co.*, 139 U.S. 199, 206; *Primrose vs. Western Union Telegraph Co.*, 154 U.S. 1, 32. The suggestion thrown out by Bramwell, B., in *Gee vs. Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further *Hydraulic Engineering Co. vs. McHaffie*, 4 Q.B.D. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

“The question arises then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore vs. New York Shot & Lead Co.*, 40 N.Y. 422. See *Sawdon vs. Andrew*, 30 Law Times, N.S., 23. But, in the language

quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, In *Elbinger Acten-Gesellschaft vs. Armstrong*, L. R. 9 Q.B. 473, 478, 'it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability?' Mr. Justice Willes answered this question, so far as it was in his power, in *British Columbia Sawmill Co. vs. Nettleship*, L. R. 3 C.P. 499, 508; 'I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for \* \* \* If (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been presented to the mind of the shipowner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. the knowl-

edge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' The last words are quoted and reaffirmed by the same judge in *Horne vs. Midland Ry. Co.*, L. R. 7 C.P. 583, 591; S.C., L. R. 8 C.P. 131. See also Benjamin, Sale, 6th Am. ed. § 872."

As the court views and weighs the evidence it is established that the only knowledge Pittsburgh had of the contract between Grace and Foundry at the time the inspection contract was entered into was the information given by Gips to Clark over the telephone and the letter received from Gips (Exhibit 21). While the court has already found that Clark's conversation over the telephone with respect to Foundry's lack of capacity to make other than cast steel billets could have no bearing on the terms of the written contract between Pittsburgh and Grace the court does believe that such conversation occurred as testified to by Clark and that evidence does have some bearing on the issue of damages particularly as to what was within the contemplation of the parties.

The penciled notes of Clark (Exhibit A-1) made at the time of the preliminary telephone conversation with Gips tend to corroborate his testimony that it was his understanding that the contract with Foundry called for cast steel billets. To the same

effect is the inter-office correspondence of Pittsburgh (Exhibit A-3) between Clark and their Seattle office under date of May 17, 1952. This evidence while inadmissible to vary the terms of the written contract is admissible and relevant to the issue of what was within the contemplation of the parties, with respect to the special damages now being claimed, at the time the contract was entered into. *Globe Refining Co. vs. Landa Cotton Oil Co.*, *supra*; *Messmore vs. New York Shot & Lead Co.*, 40 N.Y. 422; *Sutherland on Damages* (4th ed.) Sec. 51. There can be no question under the evidence that the specific or special damages claimed arose from the delivery by Grace to New Zealand of cast steel billets instead of forged or rolled billets in accordance with the specifications in all three of the contracts or purported contracts here involved.

Counsel for plaintiff has taken the position that Pittsburgh in seeking to perform its contract assumed from the beginning that the material to be furnished was cast steel billets instead of billets meeting the specifications ASTM A-17/29 as provided for under the terms of the written contract. The court, as already indicated, agrees that such was the situation, but if so how can it be reasonably contended that a result, namely damage because of furnishing cast steel billets, which is inconsistent with such assumption was within the contemplation of the defendant, Pittsburgh, when they agreed to inspect the billets to be produced by Foundry? While it may be immaterial, considering Grace's



knowledge of what would be produced by Foundry as distinguished from what was called for under the specification ASTM A-17/29 referred to in their contract with Foundry, Gips does not admit that Clark told him of Foundry's lack of capacity to produce other than cast steel billets. His lack of recollection, however, is not adequate reason in view of the corroborating circumstances with respect to Mr. Clark's version, to justify the court in accepting his statement as against that of Clark. Thus the court must find that Gips, if not actually aware at least should have been at the time of the preliminary negotiations with Pittsburgh that billets produced by Foundry would be cast steel billets although as stated earlier Clark's statement may have made little impression upon him.

Other evidence that would serve to establish that Grace should have known that the billets to be furnished by Foundry would be cast steel billets is to be found in connection with the negotiations between Schlauch of Grace's Seattle office and Murphy of Foundry. Murphy testified that he had advised Schlauch by telephone prior to the placing of the order that the Foundry would furnish billets "cast in sand mold" or "sand-cast" billets. Schlauch had no independent recollection of this part of the conversation. However, at the time conversation occurred Schlauch testified he had no knowledge of the difference between cast steel or sand-cast billets as distinguished from forged or rolled billets. He,

as well as Gips, was relying on the producer or bidder to bid in accordance with the specifications. Further, to corroborate Murphy's testimony, Schlauch in following his custom of making notes of telephone conversations made a note in his journal (Exhibit 54) on page 55 of a conversation with Murphy late in April or early in May, 1952, and such entry shows the words "Sand Cast."

Exhibit 23, a letter from Foundry to Grace, attention of Schlauch under date of May 16, 1952, and received by Grace in Seattle on May 19, and copy that day sent to San Francisco, reads as follows:

"We have just been informed of receiving the steel billet job as quoted in our letter of May 13, 1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4" sides of Item No. 1 and the 3" sides of Item No. 2.

"The steel is to be ASTM A-17/29. This is a ASTM specification put out in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

"ASTM A-17/29, Type A, Grade 2:

"Carbon	.15	.25
"Manganese	.50	.80
"Phos. max.		.045
"Sulphur max.		.05

## Grade 1:

"Carbon	.05	.15
"Manganese	.50	.80
"Phos. max.	.045	
"Sulphur max.	.05	

"No other requirements were listed, physical or chemical.

"Will you kindly verify the above."

This letter, which clearly indicates to anyone having knowledge of steel products that Foundry intended to furnish cast steel billets, was read by Gips to Clark over the telephone at or about the time of the exchange of letters between Grace and Pittsburgh which constitute the contract here involved. Regardless of how uninformed Schlauch, Vanderbilt or Gips were of the significance of the language used in the letter, its content gave reason for one such as Clark of Pittsburgh to believe that the product to be produced by Foundry was cast steel billets.

Other evidence of similar import to that referred to can be found in the record. Without further detailing the evidence under the facts and circumstances at the time the contract was entered into, as disclosed by all the evidence in this case, it is the opinion of the court that, except for the item of compensation paid Pittsburgh for services, the damages claimed by Grace were not the direct and proximate consequence of the breach of contract by Pittsburgh nor within the contemplation of both parties

at the time the contract was entered into as a likely consequence of its nonperformance. Grace is not entitled to such damages as claimed for the reasons already set forth.

As to the item of \$3,151.86 paid Pittsburgh for its inspection services under the contract it is allowed to Grace with interest at the legal rate from August 26, 1954, as damages. Grace was called upon under the terms of the contract to pay that sum for services which were not performed in accordance with the terms of their contract and which under the evidence were of little or no benefit or value to Grace. 15 Am. Jur. § 44; Board of County Commissioners of Allen County vs. Baker, 152 Kan. 164, 102 P. 2d 1006; Norm Adv., Inc., vs. Monroe St. Lbr. Co., 25 W. 2d 391.

Findings of Fact, Conclusions of Law and Judgment may be presented in accordance with this memorandum opinion, upon notice.

Dated May 17, 1956.

/s/ WILLIAM J. LINDBERGH,  
United States District Judge.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came duly and regularly on for trial before the undersigned judge of the above-entitled court on the 29th day of November, 1955, upon plaintiff's complaint and the amended third party complaint of the defendant, Pittsburgh Testing Laboratory. Plaintiff appeared by its attorneys, Thomas L. Morrow and George Prince of Bogle, Bogle & Gates. Defendant, Pittsburgh Testing Laboratory, appeared by its attorneys, Ben J. Gantt, Jr., and Frank T. Rosenquist of Graham, Green & Dunn. Third party defendant, Seatte Foundry Co., Inc., appeared by its attorneys, Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner. Evidence on behalf of plaintiff, defendant and third party defendant having been introduced, and the court, having heard the arguments of counsel on behalf of plaintiff, defendant and third party defendant and having considered briefs filed by all parties, thereafter rendered its written memorandum decision on May 17, 1956, and having considered the plaintiff's motion for rehearing and clarification of the memorandum decision, denied the same; the court, having been and now being fully advised in the premises, does hereby make the following

## Findings of Fact

## I.

The plaintiff, Grace & Co. (Pacific Coast), is a corporation organized under the laws of West Virginia and was engaged at all times herein mentioned in the operation of an export and import business and maintained offices throughout the United States, including Washington, D. C.; San Francisco, California, and Seattle, Washington. Grace & Co. (Pacific Coast) was formerly known as W. R. Grace & Co. and at all times material the two companies were one and the same corporation and will be referred to herein as "Grace."

## II.

The defendant, Pittsburgh Testing Laboratory, herein called "Pittsburgh," is a corporation organized under the laws of the State of Pennsylvania and was authorized to do business in the State of Washington, and was during all of said times engaged in the business of performing expert and professional engineering services in the testing of materials as to qualities and characteristics, and in the certifying of steel and other products as conforming to contract specifications. Pittsburgh at all times herein mentioned was a member of the American Society for Testing Materials, which is and was an organization of persons and corporations, the purpose of which was to determine and provide a standard of specifications for materials acceptable to manufacturers and purchasers alike.

The Society publishes specifications for various materials in Yearbooks which are for use of and reference by inspectors, such as defendant Pittsburgh and others, in determining and following the specifications of designated materials.

### III.

The Seattle Foundry Co., Inc., herein called "Foundry" is a corporation organized under the laws of the State of Washington and engaged in the foundry business in Seattle, Washington, in the production of steel products, not including, however, rolled or forged steel products, for which it had no facilities.

### IV.

The matter in controversy, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars (\$3,000.00).

### V.

In 1952 an inquiry was received by Grace in Washington, D. C., from the Embassy in New Zealand for material specifically described as follows:

(1) Steel Billets—Specifications ASTM-A-17/29, Type A, Grade 2 or nearest equivalent. Dimensions,  $9\frac{1}{2}'' \times 4'' \times 4\frac{1}{2}'$ . Quantity—750 billets.

(2) Billets, same specifications. Grade 1 or nearest equivalent. Dimensions  $6'' \times 3'' \times 10'$ . Quantity—50 billets.

## VI.

On April 3, 1952, the Washington, D. C., office of Grace wrote its San Francisco office requesting the San Francisco office to obtain quotations on the aforesaid items required by the Embassy in New Zealand. On April 17, 1952, the San Francisco office of Grace wrote its Seattle office requesting them to secure an offer on material as specified by New Zealand. Mr. William Schlauch, employed by Grace in Seattle, sent out letters to various producers of steel, including Isaacson Iron Works and third party defendant Foundry, requesting offers on steel billets as per specifications which were attached and which specifications corresponded identically in size, specifications and quantity sought by the Embassy of New Zealand. Mr. Schlauch received a quotation from Isaacson quoting Item (1) at \$157.50 per 2,000 pounds and Item (2) at \$178.50 per 2,000 pounds, which offer was transmitted to the San Francisco office of Grace on May 1, 1952, where it came to the attention of Mr. C. E. Gips, who was handling the transaction for Grace at San Francisco. Mr. Gips computed a profit on the basis of the Isaacson offer and on May 6, 1952, wrote his Washington, D. C., office quoting Item (1) as specified at \$168.35 f.a.s. Seattle per 2,000 pounds, and Item (2) at \$190.61 f.a.s. Seattle per 2,000 pounds. This offer was transmitted to the New Zealand Government Trade Commissioner at Washington, D. C., acting on behalf of the New Zealand Government, and the Trade Commissioner on May 9, 1952, issued a purchase offer which was accepted by Grace about



March 12, 1952, and which called for the purchase of the above-specified material setting forth the quantity, specifications, type, grade, size and weight and the price of the material, which called for the delivery in the third quarter of 1952 f.a.s. Seattle.

## VII.

Between April 23 and May 1, 1952, Foundry, having misplaced Grace's inquiry for an offer on steel billets, requested, and Grace on May 1, 1952, furnished an additional copy of the specifications. On May 2, 1952, Foundry wrote Grace quoting prices of \$120 per net ton on Item (1) and \$175 per net ton on Item (2) setting forth the size, specifications, grade, type and quantity of steel billets as required by Grace to fill its prospective order from New Zealand. In a telephone conversation between Mr. J. W. Murphy of Foundry and Mr. Schlauch at about this time, Mr. Murphy advised Mr. Schlauch that these billets are "cast steel from sand molds." On May 8, 1952, Mr. Schlauch wrote to his San Francisco office setting forth the Foundry offer, passing along the advice that the billets were "cast steel from sand molds." Mr. Gips on May 9 wrote his Seattle office requesting a check on all figures, specifications and grades mentioned in the two quotations and requesting a confirmation the first thing on May 12th, which was a Monday, that the information was absolutely without fault. He followed this up with a teletype at noon on the 12th and at the same time, Mr. Schlauch replied by teletype that the Foundry confirmed Item (1), Grade 2, and Item (2), Grade 1, and that

its quotation was "in order." On May 13, 1952, Mr. Gips teletyped his Seattle office regarding the extension of offers of Isaacson and Foundry and received back a teletype advising that both suppliers extended their offers to May 16, 1952, as requested.

### VIII.

The Seattle office of Grace, following receipt of instructions from its San Francisco office, orally advised Foundry of the acceptance of Foundry's offer and formally reduced the agreement to writing dated May 16, 1952, and which writing appears as follows:

"W. R. Grace & Co.,

"Seattle 1, Wash.

"May 16, 1952.

"Seattle Foundry Co.,

"344-13th Avenue S.W.,

"Seattle, Washington.

"Attention: Mr. J. W. Murphy.

"Gentlemen:

"We confirm telephone conversation yesterday wherein we purchased the following Steel Billets for shipment 60/90 days:

"750 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 2, Size  $9\frac{1}{2}$ " x 4" x 4'  $\frac{1}{2}$ ", about 515# each at...\$120.00/2000#

"50 Billets, as per Specifications ASTM-A-17/29, Type A, Grade 1, Size 6" x 3" x 10', about 604# each at.....\$130.00/2000#

“The above prices are FOB Seattle Foundry Co. These Billets are to be loaded on flatcars at \$3.00 per 2000# addition.

“This order is covered by Export License #A2-416-10731, expiring October 31, 1952, and the License carries a W2-3QU, 1952 rating.

“We understand you will furnish a plant certificate that the Billets conform to specification. Pittsburgh Testing Laboratories will also inspect these Billets, the cost of which will be for our account.

“Billets will be shipped loose, as no export packing is required.

“We will require the Billets to be marked as follows:

400 Pieces  $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$ .

50 Pieces  $6'' \times 3'' \times 10'$ .

“N. Z. R. 449, US-1773

“Wellington

“1/Up

350 Piece  $9\frac{1}{2}'' \times 4'' \times 4' \frac{1}{2}''$ .

“N. Z. R. 449, US-1773

“Port Chalmers

“1/Up

“Please keep us advised as to the progress of this order and when it will be ready for shipment, in order that we may arrange freight space to New Zealand.

“Yours very truly,

“W. R. GRACE & CO.,

“/s/ W. D. VANDERBILT,

“Manager.

“WDV:EB

“P.S. As your acknowledgment will you kindly sign and return one copy of this letter for our records?

“Confirmed and Accepted:

“SEATTLE FOUNDRY COMPANY,

“By /s/ J. W. MURPHY.”

## IX.

That thereafter Grace, through its said San Francisco office, made an oral agreement with Pittsburgh, through its said San Francisco office, wherein Pittsburgh agreed to inspect and deliver certificates of inspection covering the steel billets to be produced for Grace by Foundry at its said Seattle, Washington, plant; that in the conversations constituting the oral agreement Pittsburgh advised Grace that Foundry was only equipped to produce “cast steel” billets and had no facilities for rolling or forging billets; thereafter the parties Grace and Pittsburgh entered into a binding and integrated written agreement, the terms of which appear in an exchange of letters appearing as follows:

“W. R. Grace & Co.

“2 Pine Street

“San Francisco 11, Calif.

“Cable address ‘Grace’      Telephone Sutter 1-3700

“May 20th, 1952.

“Pittsburgh Testing Laboratories,

“615 Howard St.,

“San Francisco 5, Calif.

“Inspection of Steel Billets for New Zealand

“Gentlemen:

“We hereby confirm conversation between your Mr. Parker M. Robinson and our Mr. C. G. Gips and we hereby request that you make inspection and deliver certificate of inspection for the following material, which has been ordered by us through our Seattle office with the Seattle Foundry Co. of Seattle:

“750 Billets, Specifications ASTM-A-17/29,  
Type A, Grade 2, size  $9\frac{1}{2}$ " x 4" x 4'  $\frac{1}{2}$ ".

“50 Billets, Specifications ASTM-A-17/29,  
Type A. Grade 1, size 6" x 3" x 10'.

which are to be delivered to us between August 15th and September 15, 1952. Suppliers have already been informed that inspection will be carried out by you.

“Awaiting your early confirmation and acceptance of the above, we are

“Very truly yours,

“W. R. GRACE & CO.,

“/s/ C. G. GIPS,

“Export Department.

“CGG/ba”

“Pittsburgh Testing Laboratory

“651 Howard Street

“San Francisco 5, California.

“May 21, 1952.

“W. R. Grace & Co.,

“2 Pine Street,

“San Francisco 11, California.

SF 5799

“Attention: Mr. C. G. Gips, Export Dept.

“Subject: Inspection of Steel Billets for New Zealand.

“Gentlemen:

“This will acknowledge receipt of your letter of May 20th authorizing us to inspect 800 steel billets to be produced at the Seattle Foundry Company in Seattle, Washington.

“As per our verbal agreement the inspection and sampling will be done by our Seattle office on the basis of \$4.00 per hour plus expenses; and the analyses of the samples will be made in our San Francisco Laboratory at \$10.00 per sample, including Carbon, Manganese, Silicon, Phosphorous and Sulphur.

“The expenses will include local mileage in Seattle to and from the foundry at \$0.07 per mile; the cost of shipping sample to San Francisco and any long distance calls and telegrams, if any should be found necessary.

“Thanking you for this assignment, we remain

“Very truly yours,

“PITTSBURGH TESTING  
LABORATORY

“/s/ PARKER M. ROBINSON,

“District Manager.

“Parker M. Robinson

“bk

“cc: Seattle

“PTG”

Following receipt of Grace's letter of May 20, 1952, Mr. Robinson wrote Mr. M. E. Johnson of his Seattle office, enclosing a formal inter-office inspection order for the inspection of billets as specified in Grace's order and referring to Grace's letter of May 20, 1952. Among other things, Mr. Robinson advised Mr. Johnson that:

“Since their billets are being shipped to a far-away country, it is of vital importance that your inspection of them be thorough and accurate. If you do not have a competent inspector for this type of work, call in someone who does know, to consult with you.”

That while Grace informed Pittsburgh that the billets were for a customer in New Zealand they did not advise Pittsburgh of the use to be made of the billets nor were the services of Pittsburgh sought to guide or advise Grace in placing their order or awarding a contract for the purchase of the billets involved.

X.

Before production of billets started at Foundry and on May 16, 1952, Foundry wrote to Grace advising it was their intention to pour the billets in sand molds, that the steel was to be ASTM-A-17/29 specifications, setting forth the chemical composition as listed in Kent's Mechanical Engineering Handbook, advising no other requirements were listed, physical or chemical, and requesting a clarification. The letter appears as follows:

“Seattle Foundry Co., Inc.

“Seattle 4, Washington

“May 16, 1952.

“W. R. Grace & Company,

“408 White Building,

“Seattle, Washington:

“Attention: Mr. W. H. Schlauch, Export Department,

“Copy sent S.F.

“L#3270 5/19/52

“Gentlemen:

“We have just been informed of receiving the steel billet job as quoted in our letter of May 13,



1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4" sides of Item No. 1 and the 3" sides of Item No. 2.

"The steel is to be ASTM-A-17/29. This is a ASTM specification put on in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

"ASTM-A-17/29 Type A, Grade 2

"Carbon	.15	.25
---------	-----	-----

"Manganese	.50	.80
------------	-----	-----

"Phos. max.	.045	
-------------	------	--

"Sulphur max.	.05	
---------------	-----	--

"Grade 1

"Carbon	.05	.15
---------	-----	-----

"Manganese	.50	.80
------------	-----	-----

"Phos. max.	.045	
-------------	------	--

"Sulphur max.	.05	
---------------	-----	--

"No other requirements were listed physical or chemical.

"Will you kindly verify the above?

"Yours very truly,

"SEATTLE FOUNDRY COMPANY, INC.

"/s/ JAMES W. MURPHY.

"JWM:as"

## XI.

Upon receipt of the aforesaid letter and on May 19, 1952, Mr. Schlauch wrote his San Francisco office enclosing a copy of the aforesaid letter of May 16, 1952. The letter and enclosure came to the attention of Mr. Gips in San Francisco. Foundry's letter of May 16, 1952, was then read by Gips to Mr. Clark over the telephone. Mr. Clark advised Mr. Gips that their office in San Francisco had contacted their Seattle office and were supplying Pittsburgh's Seattle office with the necessary information to enable them to inspect the material as required, that there was no objection to pouring the billets as proposed by Foundry and that there had been no recent changes or amendments to the ASTM-A-17/29 specifications, confirmed that the analysis for chemical requirements was correct and gave Gips a physical requirement of the specifications for chipping. Clark also advised Gips that the Seattle office of Pittsburgh would inform the Foundry about the chipping requirements or any other requirements. This information and advice from Clark was transmitted by Gips to Grace in Seattle under letter of May 22, 1952. Grace of Seattle then on May 23 acknowledged Foundry's letter of May 16th and authorized the production procedure outlined by Foundry and approved the chemical requirements as listed by Foundry. Also on May 23, 1952, Grace at Seattle wrote to Pittsburgh in Seattle, attention Mr. Johnson, regarding the steel billet order Grace had placed with Foundry and confirmed his understanding that the Pitts-

burgh's San Francisco office would supply Mr. Johnson with the necessary information to make the inspection. There was further misunderstanding concerning the chipping requirements and on June 4, 1952, Mr. Clark in an inter-office communication wrote to Mr. Johnson directly setting forth verbatim shipping requirements from ASTM-A-17/39 (29).

## XII.

That the employees of Grace who handled the transactions with Pittsburgh and Foundry had information and knowledge that the billets to be produced at Foundry were "cast steel from sand moulds" and "cast steel billets," although until after the order was completed Grace's employees had no actual knowledge that billets produced by Foundry would not conform to ASTM-A-17/29 specifications.

## XIII.

There were no modifications, changes or amendments to the terms of the inspection contract between Grace and Pittsburgh as set forth in Grace's letter of May 20, 1952, and Pittsburgh's letter of May 21, 1952, other than the authorization of Grace on about June 10, 1952, to have the chemical analysis performed at Seattle by Northwest Laboratories at a rate of \$15.00 per each sample, and an authorization on about July 21, 1952, when Grace authorized and instructed Pittsburgh to accept 8 steel billets under Foundry heat #41, which ran a manganese content of .85 instead of allowable limit of .50/.80 as provided for in the ASTM-A-

17/29 specifications, and provided said steel billets met all other requirements of the order.

#### XIV.

During the course of production of billets at Seattle Foundry, Pittsburgh rendered reports to Grace referring to the specifications ASTM-A-17/29. In its last report dated September 23, 1952, on final inspection of billets, Pittsburgh reported, "The billets were inspected in accordance with physical requirements per ASTM-A-17/29." Pittsburgh rejected billets for chemical deficiencies when, in their opinion, rejection was warranted, and approved all other billets. Pittsburgh, in making its inspection reports, at no time sought to advise Grace that the billets produced by Seattle Foundry were "cast steel" billets rather than billets that had been forged or rolled subsequent to casting as called for in the ASTM-A-17/29 specifications. Pittsburgh failed to inspect in compliance with the specifications as set forth in their written contract and by so doing they failed to reject materials which did not conform to specifications. Their certification is not as required by the terms of the contract.

#### XV.

At all times herein mentioned billets in the ferrous industry were defined and known as semi-finish steel, forged or rolled from cast steel ingots; and the expression, "ASTM-A-17/29," was designation of a certain type of steel billet of the content and of the manner of manufacture as set forth in

the official publication of the American Society for Testing Materials as follows (Exhibit 56):

“Standard Specifications for  
“Carbon-Steel and Alloy-Steel Blooms,  
“Billets and Slabs for Forgings  
“A.S.T.M. Designation: A 17-29

“These specification are issued under the fixed designation A 17; the final number indicates the year of original adoption as standard or, in the case of revision, the year of last revision.

“Adopted, 1913; Revised, 1918, 1921, 1929.

“1. The term ‘billet’ is used in these specifications to include blooms, billets and slabs.

“2. (a) These specifications cover billets of carbon and alloy steel. Eight types of steel are covered, one type of carbon and seven types of alloy steels, classification by type being made according to the chemical composition, other than carbon.

“(b) Each type of steel is subdivided into grades according to the carbon content. There are eight grades of carbon steel and seven grades of each type of alloy steel.

“(c) The billets are further divided into two classes, designated Classes I and II. Class I is the standard for all types and grades; and Class II is a special class applicable to Grades Nos. 4 to 8, inclusive, in Type A, and to Grades Nos. 14 to 17, inclusive, in all other types. Class II differs from

Class I in the method of sampling for chemical analysis and in chemical requirements.

“3. Billets shall be purchased as semi-finished rolled or forged material.

“Manufacture

“4. The steel shall be made by either or both the following processes: Open-hearth or electric furnace.

“5. A sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation.

“6. Unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet.

“Chemical Properties and tests

“7. The steel shall conform to the following requirements as to chemical composition for type and grade:

“(a) Type—The types of steel shall be as indicated in Table I.

“(b) Grade—The carbon ranges for the various grades shall be as follows for carbon and alloy steel:”

The specifications then go on to set forth the specific chemical properties, method of making label analysis, check analysis and other tests. The specifi-

cations further provide for workmanship and finish and provide that the billet shall be free from injurious defects and have a workmanlike finish. Provisions are made for marking and for inspection and rejection.

## XVI.

On July 24, 25 and August 22, 1952, Foundry submitted its invoices for steel products sold to Grace under the agreement dated May 16, 1952, and these invoices, totaling \$27,119.16, were paid by Grace.

Pittsburgh submitted its invoices performed pursuant to Grace's letter of May 20, 1952, which invoices totaled \$3,151.86 and which were paid for by Grace.

## XVII.

The billets sold by Foundry to Grace and inspected by Pittsburgh were shipped to Wellington, New Zealand, to the New Zealand Government Railways, where and by whom they were received during August and September, 1952.

## XVIII.

The billets, following arrival in New Zealand, were inspected by employees of the New Zealand Government and were found not to conform with the ASTM-A-17/29 specifications and the court finds that the billets delivered to New Zealand under its contract with Grace did not conform to ASTM-A-17/29 specifications.

## XIX.

On May 15, 1953, New Zealand wrote Grace advising them that steel billets supplied against their order had been examined and found to be faulty in the above-mentioned particulars, and submitted a claim for refund in respect to the defective material computed on the basis of 50% of the value of Item (1), and the value of Item (2) as invoiced, plus the cost of rolling the billets to smaller sizes and inspection charges less the value of the billets in the size to which they would be finally rolled, plus an adjustment on freight, and other shipping charges. On May 22, 1953, Grace furnished Pittsburgh a copy of the aforesaid communication from the New Zealand Government containing such offer, and by letter requested the defendant to state whether or not the claim of New Zealand Government was correct. To this request Pittsburgh on June 9, 1953, acknowledged said billets would not comply with a strict interpretation of ASTM-A-17/29 specifications. Thereafter, following further negotiations, whereby New Zealand's claim against Grace was reduced to the amount of \$21,747.24, Grace paid this amount to New Zealand on August 11, 1954, after taking and obtaining releases from its liability to New Zealand.

## XX.

Grace received \$37,462.64 from New Zealand for the billets delivered under its contract and having refunded to New Zealand \$21,747.24, was therefore allowed to retain \$15,715.40. Thus Grace suffered a



net out of pocket loss of \$14,555.62 plus loss of profits of \$7,192.60 which Grace would have realized had the billets conformed to the specifications and been accepted by New Zealand under its contract with Grace.

### XXI.

The only damages suffered by Grace as a direct and proximate result of Pittsburgh's breach of its contract with Grace was the sum of \$3,151.86, to wit, the sum paid by Grace for Pittsburgh's said inspection services; that such damages were the only damages which were within the contemplation of both parties at the time said contract was entered into as likely consequence of the non-performance of Pittsburgh's contract to inspect billets produced by Foundry.

### XXII.

That Foundry did not make any false representations of material facts to Pittsburgh which were relied upon by Pittsburgh to its damage or detriment.

### XXIII.

That any additional facts as found by the court in its written memorandum decision filed herein on May 17, 1956, are hereby incorporated to supplement the findings of facts set forth herein.

From the foregoing Findings of Fact the Court does hereby make the following

## Conclusions of Law

## I.

This court has jurisdiction of the above-entitled cause, the parties thereto and the subject matter thereof.

## II.

Plaintiff is entitled to a judgment against the defendant, Pittsburgh Testing Laboratory, in the sum of \$3,151.86, together with interest thereon at the rate of 6% per annum from August 26, 1954, to the date hereof, together with plaintiff's costs and disbursements herein to be taxed.

## III.

Defendant and third party plaintiff, Pittsburgh Testing Laboratory's third party complaint against third party defendant, Seattle Foundry Co., Inc., should be dismissed with prejudice and third party defendants, Seattle Foundry Co., Inc., is entitled to a judgment against defendant and third party plaintiff, Pittsburgh Testing Laboratory, for its taxable costs and disbursements.

Dated this 21st day of September, 1956.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

[Endorsed]: Filed September 21, 1956.

United States District Court, Western District of  
Washington, Northern Division

No. 3725

GRACE & CO. (Pacific Coast),

Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,

Defendant and Third Party Plaintiff,

SEATTLE FOUNDRY CO., INC., a Corporation,  
and THOMAS H. WILLIAMS and CHARLES  
V. SMITH, Co-partners d/b/a NORTHWEST  
LABORATORIES,

Third Party Defendants.

### JUDGMENT

The above-entitled cause came duly and regularly on for trial before the undersigned Judge of the above-entitled Court, sitting without a jury, on the 29th day of November, 1955, upon plaintiff's Complaint and defendant and third party plaintiff Pittsburgh Testing Laboratory's Amended Third Party Complaint. Prior to said trial date said Amended Third Party Complaint against Third Party Defendants, Thomas H. Williams and Charles V. Smith, co-partners, d/b/a Northwest Laboratories, was dismissed with prejudice and the Order of Dismissal thereof was entered herein on October 28, 1955. Plaintiff appeared by and

through its attorneys, Thomas L. Morrow and George Prince of Bogle, Bogle and Gates. Defendant and third party plaintiff Pittsburgh Testing Laboratory appeared through its attorneys, Ben J. Gantt, Jr., and Frank T. Rosenquist of Graham, Green & Dunn. Third party defendant, Seattle Foundry Co., Inc., appeared by and through its attorneys, Lloyd R. Savage and Robert L. Lechner of Savage, Gaines & Lechner. Testimony and other evidence was adduced on behalf of plaintiff, defendant and third party defendant. At the close of the trial of the cause, the Court dismissed with prejudice defendant and third party plaintiff Pittsburgh Testing Laboratory's Amended Third Party Complaint against third party defendant, Seattle Foundry Co., Inc. The cause having been fully argued to the Court and the Court, having considered the briefs filed by all parties, thereafter rendered its written Memorandum Decision on May 17, 1956, and having considered the plaintiff's Motion for Rehearing and Clarification of the Memorandum Decision, denied the same; and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the plaintiff, Grace & Co. (Pacific Coast), hereby have and recover judgment against the defendant Pittsburgh Testing Laboratory in the sum of \$3,151.86, together with interest thereon at

the rate of 6% per annum from August 26, 1954, to the date hereof, and for plaintiff's costs and disbursements herein to be taxed.

2. That the Amended Third Party Complaint of defendant and third party plaintiff Pittsburgh Testing Laboratory against third party defendant Seattle Foundry Co., Inc., be and the same is hereby dismissed, with prejudice, and the third party defendant Seattle Foundry Co., Inc., have and recover from defendant and third party plaintiff Pittsburgh Testing Laboratory its costs and disbursements herein to be taxed.

Done this 21st day of September, 1956.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

Receipt of copy acknowledged.

Lodged September 7, 1956.

[Endorsed]: Filed September 21, 1956.

---

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that Grace & Co. (Pacific Coast), the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the judgment rendered in the above-entitled court and cause in favor of the plaintiff Grace & Co. (Pacific Coast) and

against the defendant Pittsburgh Testing Laboratory, and which judgment was entered on September 21, 1956.

WALLACE, GARRISON,  
NORTON & RAY,  
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,  
Attorneys for Plaintiff Grace  
& Co. (Pacific Coast).

[Endorsed]: Filed October 18, 1956.

---

[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents that we, Grace & Co. (Pacific Coast), as principal, and Fireman's Fund Indemnity Co., as surety, are held and firmly bound unto Pittsburgh Testing Laboratory, the defendant herein, in the full and just sum of \$250.00 to be paid to the Pittsburgh Testing Laboratory, its successors or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, by these presents.

Done this 18th day of October, in the year of our Lord One Thousand Nine Hundred and Fifty-six.

Whereas, lately in the above-entitled court and cause a judgment was rendered in favor of the plaintiff Grace & Co. (Pacific Coast) and against

the defendant Pittsburgh Testing Laboratory and the said Grace & Co. (Pacific Coast) filing in said court a notice of appeal from the aforesaid judgment to the United States Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of the above obligation is such, that if the said Grace & Co. (Pacific Coast) shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation is to be void, otherwise to be and remain in full force and effect.

GRACE & CO. (Pacific Coast),

By /s/ THOMAS L. MORROW,  
One of Its Attorneys of  
Record.

[Seal] FIREMAN'S FUND INDEMNITY CO.,

By /s/ CLAUDE E. WAKEFIELD,  
Attorney-in-Fact,  
Surety.

[Endorsed]: Filed October 18, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

On application of the plaintiff, ex parte, and the Court being fully advised in the premises, it is hereby

Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by plaintiff by Notice of Appeal filed October 18, 1956, is extended to January 15, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Done this 16th day of November, 1956.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

Presented by:

/s/ THOMAS L. MORROW, of  
BOGLE, BOGLE & GATES,  
Attorneys for Plaintiff.

[Endorsed]: Filed November 17, 1956.



[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON  
WHICH APPELLANT WILL RELY

1. The Court correctly found and concluded as follows:

(a) The plaintiff and defendant entered into a binding and integrated and unambiguous written agreement, the terms of which appear in an exchange of letters between plaintiff and defendant dated May 20, 1952, and May 21, 1952, for the inspection and certification of steel billets to conform to the American Society for Testing Materials specification, designated as ASTM A-17-29.

(b) Parol evidence may not be resorted to to interpret or vary the terms of the written contract between the parties.

(c) The defendant breached its contract with plaintiff by failing to inspect in compliance with The American Society for Testing Material specification designated as ASTM A-17-29, by failing to reject cast billets which failed to conform to said specifications, and by failing to make certification of conformance as required by the terms of the written contract.

2. The trial court erred in finding and concluding that the only damages suffered by plaintiff as a direct and proximate result of the defendant's breach of its contract was the sum of \$3,151.86 paid to defendant for inspection services.

3. The trial court erred in failing to find and conclude that as a natural consequence of defend-

ant's aforesaid breach of contract to inspect billets to conform to specifications, plaintiff was damaged in the sum of \$21,747.24, which sum plaintiff paid to New Zealand in satisfaction of the latter's claim against plaintiff as a result of failure of said billets to conform to the same specifications.

4. The court erred in concluding as a matter of law that plaintiff was entitled to a judgment against defendant in the sum of \$3,151.86, together with interests thereon at the rate of 6% per annum from August 26, 1954, and in failing to conclude as a matter of law that plaintiff was entitled to a judgment against defendant in the sum of \$21,747.24, together with interest thereon at the rate of 6% per annum from August 26, 1954.

5. The trial court erred in finding and concluding that damages sustained by Grace in the sum of \$21,747.24 were not within the contemplation of the parties at the time the contract was made, and in finding and concluding that the only damages within the contemplation of the parties was the sum of \$3,151.86 paid by plaintiff to defendant for inspection services.

6. The court erred in finding and concluding that plaintiff's damages in the sum of \$21,747.20 were the natural and proximate consequence of the breach of contract by Foundry or plaintiff's failure to purchase billets meeting the specifications called for in its contract with New Zealand.

7. The trial court erred in admitting parol evidence tending to vary and contradict the terms of

the written agreement between the parties and in considering such evidence in determining the quantum of damages.

8. The court erred in concluding as a matter of law that while parol evidence is inadmissible to vary or contradict the terms of a written contract, nevertheless parol evidence of such a character is admissible in this case on the issue of damages.

9. The trial court erred in finding that the inspection services required by plaintiff were sought by plaintiff after defendant had decided to purchase billets from Foundry and not sought to guide or advise plaintiff in placing its order or in awarding its contract for the purchase of billets to fulfil its order with New Zealand; and in failing to find that the inspection services sought by plaintiff from defendant were tentatively arranged for before defendant decided to place its order with Foundry and for the purpose of assuring Grace that if billets were purchased from Foundry to fill Grace's order with New Zealand, said billets would conform to the New Zealand order and specifications.

WALLACE, GARRISON,  
NORTON & RAY,  
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,  
Attorneys for Plaintiff Grace  
& Co. (Pacific Coast).

Receipt of copy acknowledged.

[Endorsed]: Filed December 31, 1956.

[Title of District Court and Cause.]

## ORDER FOR TRANSMITTING EXHIBITS

Whereas an appeal has been taken in the above-entitled action the Clerk of this Court is hereby directed to transmit exhibits in their original form to the Clerk of the United States Court of Appeals.

Done in Open Court this 31st day of December, 1956.

/s/ WILLIAM J. LINDBERG,  
United States District Judge.

Approved for entry:

WALLACE, GRAHAM,  
NORTON & RAY,  
BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,  
Attorneys for Plaintiff.

GRAHAM, GREEN & DUNN,  
By /s/ BEN J. GANTT, JR.,  
Attorneys for Defendant.

[Endorsed]: Filed December 31, 1956.

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision

Number 3725

GRACE AND COMPANY (Pacific Coast), a Cor-  
poration, Plaintiff,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,  
Defendant and Third Party Plaintiff,

vs.

SEATTLE FOUNDRY COMPANY, INC., a Cor-  
poration, Third Party Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS  
had in the above-entitled and numbered cause, on  
the 29th day of November, 1956, commencing at  
10:00 o'clock, a.m., at Seattle, Washington, before  
the Honorable William J. Lindberg, a United  
States District Judge.

Appearances:

THOMAS L. MORROW, and  
GEORGE NOTMAN PRINCE, of  
BOGLE, BOGLE and GATES,

Appeared for and on Behalf of the Plain-  
tiff; and

BEN J. GANTT, JR., and  
FRANK T. ROSENQUIST, of  
GRAHAM, GREEN, HOWE AND DUNN,

Appeared for and on Behalf of the Defend-  
ant and Third Party Plaintiff; and

LLOYD R. STVAGE, and  
ROBERT L. LECHNER, of  
SAVAGE, GAINES AND LECHNER,

Appeared for and on Behalf of the Third  
Party Defendant.

(Whereupon, the following proceedings were  
had, to wit:)

### Proceedings

The Clerk: Cause Number 3725, Grace and Company, Plaintiff, vs. Pittsburgh Testing Laboratory, Defendant and Third Party Plaintiff, vs. Seattle Foundry Company, Third Party Defendant; Mr. Morrow and Mr. Prince appearing for Plaintiff; Mr. Gantt and Mr. Rosenquist appearing for Defendant and Third Party Plaintiff; and Mr. Savage and Mr. Lechner appearing for Third Party Defendant.

The Court: Is the Plaintiff ready?

Mr. Morrow: The Plaintiff is ready, your Honor.

The Court: Is the Third Party Defendant ready?

Mr. Savage: The Third Party Defendant, Seattle Foundry Company, is ready, your Honor.

Mr. Gantt: The Defendant is ready, your [3\*]  
Honor.

\* \* \*

CYRIL GREGORY GIPS

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Cyril Gregory Gips. [56]

\* \* \*

Direct Examination

By Mr. Morrow:

Q. Will you state your—have you been sworn, Mr. Gips? A. I have.

Q. Will you state your name, please?

A. Cyril Gregory Gips.

Q. Your address?

A. 1604 Grand Avenue, San Rafael, California.

Q. Who is your employer?

A. Grace and Co., Pacific Coast.

Q. What job do you now hold with Grace and Company?

A. I am manager of the freight department and assistant manager of the import department.

Q. What was your job—what was your occupation—in 1952?

A. I was trader of the export department.

Q. What experience have you had in exporting and importing prior to 1952?

A. I had worked in that position for W. Grace and Company since approximately July, 1951, and previous to that I had approximately four years

(Testimony of Cyril Gregory Gips.)

experience in South America as trader and office manager. [64]

Q. What were you—what commodities did you deal with in South America? A. Lumber.

Q. And what commodities did you deal with in 1952 and prior thereto after employment by Grace and Company?

A. Various commodities. Do you wish me to state the commodities?

Q. Yes.

A. Fresh fruit, canned food stuffs, some steel items, some fresh vegetables.

Q. What was your principal item that you were handling at that time; lumber?

A. I beg your pardon?

Q. Were you handling lumber at that time?

Mr. Gantt: I object to that as leading.

A. Did I handle lumber?

The Court: Go ahead.

A. (Continuing): Did I handle lumber?

Q. (By Mr. Morrow): Yes.

A. While working for Grace and Company?

Q. Yes. A. No.

Q. The question was: What was the [65] principal commodity? Have you named it already?

A. I think so.

Q. You mentioned you dealt in steel items. What was your experience in steel?

A. Excuse me. I do not kind of understand you.

Q. Well, you handled export of steel?

A. Yes.



(Testimony of Cyril Gregory Gips.)

Q. And you so testified; now, would you just tell us what you did in that respect?

A. We obtained inquiries from mainly our Central American offices for certain steel items which I handled and I would thereupon contact the suppliers and advise them of those inquiries and request them to quote prices.

Q. What were the steel items you were dealing in?

A. Steel bars for construction purposes and oil pipe.

Q. Did you have any steel items such as steel billets or ingots or castings that you dealt with?

A. No.

Q. Do you know the difference between an ingot and a billet? [66]

A. No.

Q. In dealing with your steel bars and the steel items which you dealt with, did you have any ASTM specifications?

A. Yes; each item—the steel pipe and the construction bars—were sold on an ASTM specification.

Q. Did you know the requirements set forth in those ASTM specifications?

A. No.

Q. Now, I would like you to refer to Plaintiff's Exhibit 1.

Mr. Morrow: I would like to offer Plaintiff's Exhibit 1 in evidence at this time.

Mr. Gantt: No objection to Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1 may be admitted.

(Plaintiff's Exhibit 1 admitted.)

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Is it all right to hand this to the witness?

The Court: Yes.

Q. (By Mr. Morrow, Continuing): Will you state what Plaintiff's [67] Exhibit 1 is, Mr. Gips?

A. It is a letter from our Grace and Company, Washington office on an inquiry on steel billets for the New Zealand Government.

Q. Was that received by you? A. Yes.

Q. And it is indicated by a receiving stamp when it was received? A. Yes.

Q. When was it received?

A. I beg pardon?

Q. When was it received?

A. On April 7, 1952.

Mr. Morrow: Thank you. Your Honor, I don't know whether I should take up the time to read this in evidence. It is quite an important thing. It is the start of this inquiry.

The Court: You might, if you wish; or, you can hand it to me. I can read it.

Mr. Morrow: Very well. [68]

\* \* \*

Q. Now, following receipt of your inquiry from your Washington office, Plaintiff's Exhibit 1, which you may look at, do you recall what you did in response to that inquiry? A. Yes.

Q. What did you do?

A. I contacted the Company's steel relations or relations in the steel business to find out who would be a possible supplier for this type of material.

(Testimony of Cyril Gregory Gips.)

Q. And what information did you receive, if you recall?

A. I received information that two companies——

Mr. Gantt (Interposing): Objection. From whom did he receive the information?

Mr. Morrow: He said from——

Mr. Gantt: (Interposing): How, and what time, and what place?

A. (Continuing): I called by 'phone Mr. Gleason, export manager of Kaiser Steel [83] Corporation with whom I was in regular contact, and asked him who would be able to supply this type of material and he suggested two names to me, Seidelhuber and Isaacson Iron Works up in the Northwest.

Q. (By Mr. Morrow): Now, referring to Plaintiff's Exhibit 2, can you state what that is?

A. Yes. That is a letter I wrote to our Grace Seattle office requesting them to obtain an offer for the material I have described in the letter up in their area and suggesting to them that—to contact two people mentioned herein. [84]

\* \* \*

Q. Did you receive a response to the inquiry for quotations from your Seattle office, Mr. Gips?

A. I did.

Q. Referring you to Plaintiff's Exhibit 5, is that the response you received from your Seattle office?

A. That is right, that is the answer.

(Testimony of Cyril Gregory Gips.)

Q. And that is a quotation of the New Zealand—rather, of the Isaacson Iron Works?

A. That is correct.

Q. As per the named specifications of the New Zealand Government? A. Yes.

Mr. Gantt: Objection. The exhibit speaks for itself, your Honor.

Mr. Morrow: I am just identifying it.

Q. (By Mr. Morrow): And did you subsequently receive the formal proposal of the Isaacson Iron Works? I show you Plaintiff's [85] Exhibit 6. A. No. [86]

\* \* \*

Q. (Continuing): Referring to Plaintiff's Exhibit 5, following receipt of that information what did you do in connection with the prospective New Zealand order?

A. I computed a price on the basis of the offer as quoted from Isaacson and submitted same to our Washington office for submission to the New Zealand Trade Commissioner.

Q. And referring to Plaintiff's Exhibit 8, is that the letter that you referred to your Washington office? A. That is correct.

Mr. Morrow: This is exhibit 8, your Honor.

Q. (By Mr. Morrow): Now, Mr. Gips, the letter to your Washington office, I believe, is dated May 8, 1952. Now, I hand you what are a series of wires, teletypes, Plaintiff's Exhibit 66, all of which are dated May 9, 1952. Now, with reference to those ex-

(Testimony of Cyril Gregory Gips.)

hibits which are admitted in evidence, can you tell what you did in connection with this New Zealand inquiry of May 9, 1952?

A. Yes. I received a wire from our Grace [87] Washington office requesting us to confirm grades of the material offered. That was early in the morning, 8:58, and as a result of that wire I sent a wire to our Seattle office requesting the same confirmation of grades. That was at 9:35. At 10:20 I received a reply from our Seattle office that those grades were in accordance with request and they also advised that the Isaacson Iron Works now stated to get an allocation for 430 pounds of carbon steel. Then as a result of that answer I wired back to our Washington office the reply to their earlier wire in which I confirmed the grades and stated that requirement for allocation of carbon steel. Then again at 1:00 o'clock—1:06—I received a wire from our Washington office——

The Court (Interposing): Are you just reading these wires?

Mr. Morrow: No, he is just telling what he did, your Honor.

Let me have that wire and I would like to read it to the Court.

Q. (By Mr. Morrow): This is the wire that you received from your Washington office?

A. Yes, sir. [88]

Q. "May 9, 1:05 p.m. Steel for New Zealand. Expect to have order from embassy on Monday. Please advise shipping weight each grade today."

(Testimony of Cyril Gregory Gips.)

By the way, there are two wires, one pink and one yellow. What is the significance of that?

A. Well, in every office the pink would indicate an incoming wire and the yellow an outgoing wire. However, I did notice there are wires from two offices in there.

Q. Now, handing you Plaintiff's Exhibit 9, the exhibit indicates that there was a letter written May 8, 1952, by Mr. Schlaugh to the San Francisco office, and with a receipt stamp of May 9, 1952. Can you tell us, Mr. Gips, if that letter was received from your Seattle office and came to your attention on May 9, 1952?

A. Yes, it did.

Q. Was that the first information you had concerning the quotation of billets by the Seattle Foundry?

A. Yes, it was.

Q. Now, in respect to the other wires contained in Exhibit 66, will you tell us what you did in connection with the Seattle Foundry and the [89] Isaacson offers so far as your wires are concerned?

A. When receiving—after having received the wire from our Washington office advising that they would give us the order on Monday they requested shipping weight and I wired the Grace Seattle to request them to immediately advise the shipping weight of each grade and also requested them to advise if Seattle Foundry could confirm the grades as was specified earlier in the morning and what allocation they required. In answer to that—

Q. (Interposing): First of all, why did you request that information?

A. Well, because it was a second offer I re-

(Testimony of Cyril Gregory Gips.)

ceived from the same business and in such a case it was—you would have to determine if they also confirmed the same grades as was required as the first supplier did. In other words, to have an identical same offer.

Q. Had your Washington office requested any confirmation along that line previously?

A. Well, they had in the first wire I—rather, our Washington office had requested us to confirm the grades of the steel and inasmuch as since then we had received the second offer on the same material we wanted to make sure that the [90] second offer was identical to the first offer to be able to consider them both under the same light.

Q. And did you receive any reply from your Seattle office?

A. Yes. They replied to us at 4:09 p.m. in the afternoon that——

Q. (Interposing): That is fine.

Mr. Morrow: I would like to read this, may it please the Court.

Q. (By Mr. Morrow, Continuing): “6.” That refers to the number of the teletype, does it?

A. Yes.

Q. “Your 94”; that would be San Francisco—94? A. Yes.

Q. “Isaacson quotation, item one, 530 pounds, item two, 620 pounds. Re Seattle Foundry will rep.”

What does that mean?

A. That is “will reply.” That was a mistake in

(Testimony of Cyril Gregory Gips.)

the machine apparently. It dropped a couple of lines.

Q. Very well. Now, at that time did you notice—did you observe—the difference in the Isaacson quotation? When I refer to the Isaacson quotation I refer to the information that Mr. Gips [91] had and the price as quoted by Seattle Foundry.

A. Yes. I had compared one against the other and found that the Seattle Foundry's prices were substantially lower than those of Isaacson Iron Works.

Q. Do you recall what you did in connection with that matter?

A. Well, I immediately tried to recheck everything and consequently wired our Seattle office, or wrote them, inquiring—

Q. (Interposing): I refer you to Plaintiff's Exhibit 27. Does that refresh your recollection as to what you did?

A. Yes. That is the letter that I wrote.

Q. You needn't read it but I would like to read it to the Court. [92]

\* \* \*

The Court: That is signed by—

Q. (By Mr. Morrow, Continuing): Is that signed by you, Mr. Gips? A. Yes.

Q. And to whom did you direct that letter?

A. To Mr. Schlaugh of the Seattle office.

Q. And who is Mr. Schlaugh?

A. He, so to speak, is my counterpart in the



(Testimony of Cyril Gregory Gips.)

Seattle office. He was the trader there who handled the merchandising in the Grace Seattle office.

Q. This letter that we have just talked about, Plaintiff's Exhibit 10, dated May 9th, do you recall what day of the week, or have you checked the day of the week, May 9, 1952, was?

A. Yes. I have checked it. It was a Friday.

Q. Friday? A. Yes.

Q. Was there anything else to your recollection that you did on Friday, May 9th, in [93] connection with this prospective New Zealand order?

A. No, I don't believe so.

Q. Now, did you subsequently receive the——

The Court: I am going to interrupt a moment.

Mr. Morrow: Yes.

The Court: So that the record is clear, I think when you inquired and showed the letter to Mr. Gips you referred to Exhibit 27. Apparently that is the same as Exhibit 10. When you said Exhibit 27 I think you were using another list. Just so that we get the record straight.

Mr. Morrow: Did I say 10 or 27?

The Court: You said 27 when you refreshed his recollection.

Mr. Morrow: Yes.

Mr. Gantt: That is correct, your Honor.

Mr. Morrow: That is a previous——

The Court (Interposing): Number?

Mr. Morrow: Yes, and the record will so show.

Q. (By Mr. Morrow, Continuing): Now, did you receive a purchase order from the New Zealand

(Testimony of Cyril Gregory Gips.)

Government Trade [94] Commission in your office in San Francisco?      A. I did.

Q. Referring you to Plaintiff's Exhibit 11, I will ask you if that is the purchase order?

A. It is.

Mr. Morrow: I would like to show this to the Court and point out the specifications, particularly the ASTM A-17/29 specifications, and the billets, 750 in connection with one size and 50 in connection with the other size.

Q. (By Mr. Morrow): Now, Mr. Gips, referring you to Plaintiff's Exhibit 12, which is a teletype in evidence, dated May 12th at 12:02 p.m., did this teletype come to your attention?

A. That was a teletype that I sent.

Q. That was a teletype you sent?

A. That was a teletype I sent.

Q. And where did that go?

A. That went to our Seattle office.

Q. And what does this "2" refer to?

A. May I see it again? Excuse me. That is a regular company communication where the message has a separate number form.

Q. Is that your office number? [95]

A. That is from our office. It is numbered message number two from our office.

Q. Now, "Our 9586," what does that refer to?

A. That refers to the letter I had sent on Friday night which you exhibited just a short while back. That is the number of the letter.

(Testimony of Cyril Gregory Gips.)

Q. Exhibit 10? Is this Exhibit 10 the letter "9586"?

A. Yes. It says that here on the top.

Q. I see. In other words, the reference here "2" is your teletype number and you refer to your previous letter "9586," which is Plaintiff's Exhibit 10; is that correct?

A. That is correct.

Mr. Morrow: I would like to read this teletype. It is dated May 12th, 12:02 p.m., which would be on a Monday.

"2. Our 9586. Please reply explaining substantial difference in price."

Q. (By Mr. Morrow): Did you receive an answer to that teletype, Mr. Gips?

A. I did.

Q. And referring you to Plaintiff's Exhibit 13, is that the reply from your Seattle office? [96]

A. That is.

Q. Did that come to your attention?

A. It did.

Mr. Morrow: I would like to read this in evidence. May 12th, 12:02 p.m., the same time as the teletype from Seattle—to Seattle which I just read. The two teletypes apparently sent at the same time.

"8. Your 94 and 9586."

This is a reply from Seattle to San Francisco.

"Seattle Foundry confirms item one, grade two, item two, grade one, quotation for our 3234 in order. Seattle Foundry now advise nickel steel not required these specifications. Therefore, do not need any allocation. Presume you have New Zealand space from Seattle."

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): Mr. Gips, what does the "8" refer to in this—"8, your 94"?

A. Does the message start off with the number eight?

Q. Yes.

A. Then it means that the message number is number eight. [97]

Q. And "Your 94 and 9586"?

A. 9586, that was the letter which was written Friday afternoon which you had in evidence just now and which is numbered by that number and the message 94 must be a message of the previous Friday. I would have to go through the files to identify it.

Q. Ninety-four is one of the messages contained in Plaintiff's Exhibit Number 66, is it?

A. May I see it?

Q. Yes. A. Yes, that is correct.

Q. And 9586 has reference to the letter of May 9th, your letter to the Seattle office of May 9th?

A. That is right.

Q. Now, what information did the—we shouldn't say information but what was your understanding as to whether or not the Seattle Foundry office was correct with reference to the message you received from——

Mr. Gantt: Objection, your Honor, as to understanding.

Q. (By Mr. Morrow, Continuing): Seattle May 12th?

The Witness: Excuse me. [98]

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: I don't know whether the words "in order" require explanation.

The Court: You are refering now to Exhibit 13?

The Witness: Yes, sir.

Mr. Morrow: Yes.

The Court: What is it you are asking?

Mr. Morrow: The message reads, in reply to the letter, to check the specifications, and in reply to two teletypes, one to check—one to his wire, which had just gone out, I guess it was, and also a previous wire in connection with grades, and then part of the Exhibit 13 says:

"Quotations per our 3234 in order."

My question to Mr. Gips is: What did he understand by those words. I think that it is a telegram or wire which needs some explanation and to show the state of mind on Mr. Gips' part.

Mr. Gantt: The objection is to a conclusion, your Honor.

The Court: I will overrule the objection. Do you understand the question?

The Witness: Yes, sir.

A. The "in order" there stands for that they confirm the price, specifications, and other [99] items which I had requested checked in my letters and wire; that they were found to be correct—in order—correct.

The Court: You stated you understood that?

The Witness: That is what I understood.

Mr. Gantt: I object to the answer and move that it be stricken.

(Testimony of Cyril Gregory Gips.)

The Court: Objection overruled. The motion is denied.

Q. (By Mr. Morrow): Now, on May 13th, Mr. Gips, there is a wire here, Plaintiff's Exhibit 15.

Mr. Morrow: May the Court please, on these wires, the only part relevant to the case is the wire which refers to steel billets in each instance. There are other messages which have nothing to do with this case. For example, here there is steel billets, and there is oats down here, and butter and lumber and in all the wires the identification of the wire is the steel billets.

Q. (By Mr. Morrow, continuing): Referring you to Plaintiff's Exhibit 15 now, can you state whether you sent such a wire as that and did you get such a reply as appears [100] in Plaintiff's Exhibit 16?

A. I did send this message.

The Court: Number 15?

The Witness: On the 13th, your Honor. Yes, it is Exhibit 15.

Mr. Gantt: If the Court please, it is a little difficult to hear. If Mr. Gips could talk a little louder——

The Witness (Interposing): Excuse me.

Mr. Gantt (Continuing): and also when you are dealing with the teletypes with three or four things on them, will you report where on the page is the wire you sent?

Mr. Morrow: I think it would be much simpler

(Testimony of Cyril Gregory Gips.)

and faster if Mr. Gips could just read the wire, if you would have no objection.

Mr. Gantt: With regard to these wires where there are more than one of them on the page, that is satisfactory. Regarding 15 and 16, that is satisfactory.

Mr. Morrow: All right.

Q. (By Mr. Morrow): Will you read the message you sent, referring to Exhibit 15, Mr. Gips?

A. Steel billets, sent May 13, 1952. [101]

Q. By the way, what day of the week was that?

A. Tuesday.

Q. Tuesday?

The Court: What was the date again?

The Witness: Tuesday.

The Court: The date?

The Witness: The 13th.

A. It is message number four. It states:

“Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Ref your letters 3234 and 3208 this reply to your 16 5:00 p.m. Probably will place order soonest.”

The Court: Probably will place order what?

The Witness: Soonest.

Q. (By Mr. Morrow): What message—this is sort of a shorthand way of saying things, Mr. Gips?

A. That is correct.

Q. Will you interpret that wire for us, please?

A. I hereby requested our Seattle office to confirm to us that the Seattle Foundry and Isaacson Iron Works would extend their bids, firm to us [102]

(Testimony of Cyril Gregory Gips.)

or to our Seattle office, and reply by the 16th of May, 5:00 p.m., which would be the end of the working day, and we put them on notice that we expected to place the order as soon as possible. "Soonest" is a wiring word which means as soon as possible.

Q. Now, by the way, what hour was that wire?

A. That is at 11:40 a.m.

Q. 11:40 a.m.; and now your reply, referring you to Plaintiff's Exhibit 16. It is the reply you received from your Seattle office. First, what was the hour?

A. The message was received at 2:25 p.m.

Q. And the date?

A. And the date was the 13th of May, 1952, steel billets, number 18.

"Your 4. Both suppliers extend offers per our 3208 and 3234. Reply May 16."

The Court: That is a reply from Seattle?

The Witness: That is the reply from Seattle, your Honor.

Q. (By Mr. Morrow): Now, following receipt of the wire from Seattle and during this period May 9th to May 13th, [103] what considerations did you give to placing the order with either Isaacson or Foundry?

A. The offer of Isaacson came in first and the Seattle Foundry offer came in second. It was the identical same offer except for price. The Seattle Foundry price was substantially lower, and had in the meantime been rechecked. Also terms and conditions. The further consideration was with whom to place the business, in other words, the supplier. The



(Testimony of Cyril Gregory Gips.)

consideration was that the Isaacson Iron Works were rather well known and a reputable firm and the Seattle Foundry Company was comparatively unknown, at least to us, and we had not heard of them previously. So, we considered that in case of choosing between the two we would prefer to hand it to the lowest bidder but on the other hand we did want to assure ourselves of the reputation, or to be sure that we were getting the right materials from an unknown supplier.

Q. What did you do in that connection so far as Seattle Foundry was concerned?

A. Well, we came to the consideration that we had to assure ourselves that they would supply the correct material in accordance with the purchase made from us. [104]

Mr. Gantt: Objection, your Honor. I think the question was what he did. He is just saying what he thought. May the question and answer be read back?

The Court: The Reporter will read the question and answer.

(Whereupon, the following was read by the Reporter:)

“Q. What did you do in that connection so far as Seattle Foundry was concerned?

“A. Well, we came to the consideration that we had to assure ourselves that they would supply the correct material in accordance with the purchase made from us.”

(Testimony of Cyril Gregory Gips.)

The Court: I think the answer might be stricken; then answer the question as put.

Mr. Gantt: Yes.

Mr. Morrow: I, perhaps, might rephrase the question.

Q. (By Mr. Morrow): Did you make any inquiry, Mr. Gips, about the possibilities of obtaining an inspection firm to inspect the material?

A. Yes, I did.

Q. Did you consider it necessary to make [105] and inspection if the material were bought by the Seattle Foundry Company? Bought from—yes, if the material were to be bought from the Seattle Foundry?

Mr. Morrow: Strike that.

The Court: Let me get that last answer that he gave there. You asked if he made inquiries? What was that question?

(Whereupon, the following was read by the Reporter:)

“Q. Did you make any inquiry, Mr. Gips, about the possibilities of obtaining an inspection firm to inspect the material?

“A. Yes, I did.”

Mr. Morrow: I got ahead of myself.

Q. (By Mr. Morrow, continuing): From whom did you make inquiry, Mr. Gips?

A. From Mr. Gleason of the Kaiser Steel Corporation.

(Testimony of Cyril Gregory Gips.)

Q. And what information did you get from him?      A. He——

Mr. Gantt (Interposing): Objection, your Honor. The answer would be hearsay. [106]

Mr. Morrow: I don't think it is hearsay.

The Court: I believe it is hearsay, all right.

Mr. Gantt: He is asked to tell what he heard from Mr. Gleason, who is not a party to the case.

Q. (By Mr. Morrow): Did Mr. Gleason make any recommendation to you, Mr. Gips, concerning any of the laboratories that are available to make an inspection of material that might be purchased in Seattle?      A. Yes.

Q. Did he suggest any name to you?

A. He did suggest a name.

Q. What name did he suggest?

A. Pittsburgh Testing Laboratory.

Q. Now, following that, what did you do in connection with the matter of inspection?

A. I 'phoned Pittsburgh Testing Laboratory in San Francisco and—excuse me, does this conclude the question, or the answer, I should say?

Q. Who did you talk to there?

A. To Mr. Clark.

Q. And what was the—what did you talk [107] about? What did—what inquiries did you make, for example?      A. I stated to him that——

Mr. Gantt: If your Honor please, objection. This conversation is not related to a time. It has no relation to when it was being made.

The Court: Can you fix that?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Approximately when did you contact Mr. Gleason first of the Kaiser Steel?

A. Immediately after the prices of both firms had been rechecked and I had come to the conclusion that there might be a possibility of placing the business with Seattle Foundry.

Q. Can you fix that date by referring to any of your messages?

A. I think I could. I mean, I can indicate in which period.

Q. Referring you to Plaintiff's Exhibit 16, can you fix your—the date of your—conversation with Mr. Clark with reference to that exhibit? What is the time of that exhibit?

A. 2:25 p.m.

Q. Of what day? [108]

A. On the 13th of May.

Q. Now, did this conversation with Mr. Clark occur prior to that time or subsequent to that time?

A. It took place after the verification of prices had taken place.

Q. Did I hand you the right wire?

A. I think that those——

Q. (Interposing): This is the wrong wire. Here. Well, there are two wires here, the one extending the offer, 2:25 p.m., and the other one in reference to the matter being in order. Now, can you tell us with reference to any of those documents and the time therein as to when you had this conversation with Mr. Clark?

(Testimony of Cyril Gregory Gips.)

A. Well, the confirmation of conditions was at 12:02, on May 12th, which, if I am not mistaken, was a Monday. It would have taken place between that moment and the moment I placed the order with the Seattle Foundry.

Mr. Gantt: Objection, your Honor. What is the moment that he placed the order with Seattle Foundry?

Mr. Morrow: We are just getting to that. [109]

The Witness: I think you can find that in the records.

Q. (By Mr. Morrow): Referring you to Plaintiff's Exhibit 15, what is that? Would you give the time and the hour and read what that wire is?

The Court: This is what. Plaintiff's Exhibit what?

Mr. Morrow: Plaintiff's Exhibit 15, your Honor.

The Witness: Plaintiff's Exhibit 15, yes.

A. It is a message which I sent, which Grace, San Francisco, sent to Grace, Seattle, and reads as follows:

"Steel billets. 5/13/52. 11:40 a.m.

"4. Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Ref your letters 3204 and 3208. This reply to your 16 5:00 p.m. Probably will place order soonest."

This is the message I sent requesting an extension of—

Q. (By Mr. Morrow, interposing): Yes; now, can you tell us, in reference to these messages, when

(Testimony of Cyril Gregory Gips.)

you talked to [110] Mr. Clark or any particular day or period?

A. Yes. After twelve o'clock noon, Monday, but before the placing of the order with our Seattle office for placing with the Foundry.

Q. When you say "\* \* \* placing \* \* \* the order \* \* \*" with Seattle Foundry, are you referring to——

A. (Interposing): This is not—excuse me. I am referring to when I wired our Seattle office placing the business or accepting the Seattle Foundry offer from them and advising them of such, and I did——

Q. (Interposing): Is this the matter you have reference to, Exhibit 17?

A. Yes. This is the message that I am referring to. In other words, I place the conversation between noon, Monday, and May 15th, 11:49 a.m.

Q. And May 15th, 11:49 a.m.? A. Yes.

Mr. Morrow: I would like to read this wire at this time, your Honor. "1952, May 15, a.m. 11:49, steel billets 18 your 18 confirm Seattle Foundry accepting order as per your letter 3234 and TT8 we certify license A2-416-19731 expiration Oct. 31st and W2-3QU 52 rating. Inspection will be made by Pittsburgh Testing Lab." [111]

Q. (By Mr. Morrow): Now, as I understand now, Mr. Gips, you say that this conversation that you are referring to with Mr. Clark took place prior to May 15th at 11:49, the time of sending the Exhibit 17? A. That is correct.

(Testimony of Cyril Gregory Gips.)

Q. And it occurred after Monday, May 12th?

A. That is correct.

\* \* \*

Q. Following your wire of the 17th to your Seattle office, did you receive any confirmation of that, Mr. Gips, referring you to Plaintiff's Exhibit 18?

A. Excuse me; could you repeat the question, Mr. Morrow?

Q. Well, you sent this wire, Plaintiff's Exhibit 17, in which you requested confirmation of [112] the Seattle Foundry accepting the order. Did you receive—and you advised that an inspection would be made by Pittsburgh Testing Laboratory—did you receive a reply back from your Seattle office?

A. I did.

Q. Is that Plaintiff's Exhibit 18?

A. That is correct.

Q. Now, would you just read that, giving us the date and the hour?

A. Steel billets message was sent 1952, May 15th, 3:08 p.m.:

"31. Your 18. We confirm. Will advise tomorrow if Seattle Foundry requires any allocation."

The Court: What was the date of that?

The Witness: The 15th, your Honor.

Mr. Morrow: May 15th.

Q. (By Mr. Morrow): The time?

A. 3:08.

Q. 3:08 p.m. Could you tell us whether you considered that wire to be a confirmation of the acceptance of Seattle Foundry?

(Testimony of Cyril Gregory Gips.)

A. That is correct.

Q. And who was that wire received from? [113]

A. We received that from our Seattle office.

Q. Who specifically in Seattle, if you know?

A. Mr. Schlaugh. I cannot be definite about that, Mr. Morrow.

Q. Now, referring you to Plaintiff's Exhibit 19, did you write that letter? A. I did.

Q. And is that your signature?

A. That is correct.

Q. And did you notice the enclosure there—the enclosure? I think there is an original and a copy.

A. That is correct. An original and a copy of a purchase order.

Q. And you sent that letter to your Seattle office, did you? A. That is correct.

Mr. Morrow: At this time, your Honor, I would like to read this letter:

“May 15, 1952.”

This is Plaintiff's Exhibit 19, with a receipt, Seattle receipt, stamp on of May 16, 1952. [114]

\* \* \*

Attached to that is the enclosure which is the so-called purchase order form of the Grace Company and in this case we have——

The Court (Interposing): It is part of the one exhibit?

Mr. Morrow: It is part of the one exhibit; but in this case we have sometimes put in copies. That is, one copy would be from a Seattle office and one



(Testimony of Cyril Gregory Gips.)

from a San Francisco office. In this case the original exhibit consisted of this top purchase order.

Now, I would also like to have the Court read—rather, to take a look at—the purchase order and particularly the matters in reference to the specifications required at that time.

(Whereupon, there was a brief pause.)

Q. (By Mr. Morrow): Mr. Gips, in connection with your dealings with Pittsburgh Testing Laboratory, did you write a letter, referring you to Plaintiff's Exhibit 21? A. I did.

Q. And is that your signature?

A. That is correct.

Q. And did you receive a reply from [116] Pittsburgh? A. I did.

Q. And referring you to Plaintiff's Exhibit 22, is that the reply that you received?

A. That is correct. [117]

\* \* \*

Q. Mr. Gips, you have stated that you called the Pittsburgh Testing Laboratory and talked to [136] Mr. Clark some time between the 12th and noon of the 15th.

Mr. Gantt: If the Court please, I think the record shows that that was between the 13th—

Mr. Morrow (Interposing): I may stand corrected on that.

The Court: Well, we can ask the witness if he wishes to restate that.

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: I think we should refer to Exhibit 16.

The Court: Exhibit 16 is a wire reply received 12:25 p.m., May 13, 1952.

Mr. Morrow: And perhaps Exhibit 15, and the further wires on the 15th, Exhibit 16, I believe—or, 17, is it—I have 16—17.

Q. (By Mr. Morrow, continuing): Referring to Exhibits 15, 16 and 17, Mr. Gips, can you tell us when you called the Pittsburgh Testing Laboratory? Can you fix the approximate date or dates?

A. I believe I did so yesterday and I would like to reiterate that today—that I think the time is placed between Monday, the 12th, and Thursday, the 15th, at which time the order was placed; and, I [137] think, this matter came up yesterday but I am quite positive that it was after I had received a wire communication from our Seattle office stating that the Seattle Foundry could also confirm the grades as we had requested them to advise us on the previous Friday. That would determine the period. The starting period would be on the 12th rather than the 13th of May.

Q. How do you fix the 15th as——

A. (Interposing): On the 15th I placed the order or accepted the bid of the Seattle Foundry and previous to that I had concluded the verbal understanding——

Mr. Gantt (Interposing): Objection, your Honor. I would like to get it clear whether the witness is doing this from his own recollection or ref-

(Testimony of Cyril Gregory Gips.)

erence to an exhibit and, if so, what is the particular exhibit?

The Court: Mr. Gantt, if you will, hold your objections until the witness is through. You are very rude.

Mr. Gantt: I apologize, your Honor.

The Court: The Reporter will read the answer.

(Whereupon, the following was read by [138] the Reporter:

("A. On the 15th I placed the order or accepted the bid of the Seattle Foundry and previous to that I had concluded the verbal understanding"—)

A. (Continuing): —the verbal understanding with the Pittsburgh Testing Laboratory to conduct an inspection and certify the quality of the product which was to be produced by the Seattle Foundry Company. After that verbal agreement I placed the order with, or accepted the bid of, Seattle Foundry Company; and I believe—

Q. (By Mr. Morrow): And did you refer to a particular wire? A. That is correct; yes.

Q. Which wire is that? Which exhibit is that before you? Would you just read the time and the date there on the wire first?

A. That is a wire from Grace, San Francisco.

Q. Is that Exhibit 17?

A. Exhibit 17, of May 15, 1952, 11:49 a.m.:

"Steel billets. 18 your 18. Confirm Seattle Foundry accepting order as per your letter 3234 and TT

(Testimony of Cyril Gregory Gips.)

8 we certify license A2-416-10731 expiration October 31st and W2-3QU 52 rating. Inspection will be made by Pittsburgh Testing Laboratories.” [139]

The Court: You have read that?

The Witness: I have read the contents of the wire, your Honor.

The Court: Of Exhibit 17?

The Witness: Of Exhibit 17.

Q. (By Mr. Morrow): Now, will you please refer to Plaintiff's Exhibit 19 and state whether your telephone talk to Pittsburgh was prior to writing this letter, Exhibit 19? A. Yes, it was.

Q. Is that your signature on Plaintiff's Exhibit 19? A. That is correct.

Q. Very well; now, what was the subject of your call to Pittsburgh Testing Laboratory—Mr. Clark? You said you talked to Mr. Clark—called Pittsburgh and talked to Mr. Clark. What was the subject of that conversation?

The Court: Before we proceed, do you want to fix any more time on that?

Mr. Gantt: No, your Honor, and I apologize for interrupting as I did.

The Court: I know you didn't intend [140] that. I might suggest this on objections here. If you will, let a witness complete his answer or Counsel complete his question before you object. Now, it is a little different, I feel, when you are trying a case before the Court than before a jury where you have to interrupt because something may be going in, something that may have to be stopped; and

(Testimony of Cyril Gregory Gips.)

there may be occasions here, but, if you don't have to do it to protect your record, I ask you to wait until a question or answer is completed and then you may move to strike; and, of course, circumstances are to be brought out and cross-examination covers that.

With that preliminary, you may go ahead.

The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. Very well; now, what was the subject of your call to Pittsburgh Testing Laboratory—Mr. Clark? You said you talked to Mr. Clark—called Pittsburgh and talked to Mr. Clark. What was the subject of that conversation?"')

A. Mr. Morrow, are you referring to the first conversation, or the conversation whereby we closed the verbal agreement? [141]

Q. (By Mr. Morrow): Yes. Well, I am talking about the first conversation.

A. The first contract I had with Pittsburgh Testing Laboratory was by 'phone and I talked to Mr. Clark and I informed him that we had obtained steel billets and that his company had been recommended to me to make inspection for quality of the product to be delivered and that we had intention of—we were considering placing this order with Seattle Foundry Company in Seattle.

(Testimony of Cyril Gregory Gips.)

Q. Mr. Gips, may I ask: Did you tell him who you were and who you represented?

A. That is correct. I introduced myself and inquired if Mr. Clark represented Pittsburgh Testing Laboratory and explained the situation to him: That we had this order and that we were considering placing it with Seattle Foundry Company and that we felt that we wanted to have an independent inspection service guarantee us the quality of the product since the Seattle Foundry Company was practically unknown to us and we felt that we could only place the business with them if we had that additional protection and I asked him if [142] Pittsburgh Testing Laboratory did such work and he said, yes, that is what they were for, and then later on he brought me——

Q. (Interposing): Now, was there any discussion about the price that they would charge for their services?

A. I asked him in case they would be able to do so what would their price for inspection be and Mr. Clark quoted me prices and that finalized the situation as far as that was concerned. I told him we would call him back later if we would go through with it.

Q. In this first conversation do you recall whether or not you gave him any specifications?

A. Yes. I read him the letter of inquiry which we had received from our Wasington office. I believe that would refer to Exhibit Number 1 if I have the right thing in mind.

(Testimony of Cyril Gregory Gips.)

Q. Yes. Yes, well now, after you had this talk with Mr. Clark what did you do in connection with the—with this matter?

A. Well, I took the rates which Mr. Clark had given me and tried to make a calculation of how much this inspection would cost us and added that to the cost of the Seattle Foundry offer in order to [143] see if the expense, the additional expense, of having an inspection would not burden the cost so much that it would be higher than the cost of the first bid we had accepted—we had received from Isaacson Iron Works.

Q. In this first talk you had with Mr. Clark, do you recall whether or not you asked him to make an estimate or give you a firm price upon the whole job?

A. Well, I asked him. The rates are based upon an hourly basis work and the amount of work done and I asked him if he wasn't able to give us a flat price per ton or for the whole work and he said that that was not usual, that it was usual for an inspection to be conducted and they could not perceive how long such an inspection would take, depending on the facilities, and that, therefore, they were unable to give us a flat rate so that it was left standing there—that they would charge us on an hourly basis and any expenses that they would incur, I do remember him telling me, in this inspection that they would be able to inspect in Seattle through their own facilities there but that the analysis of any material would have to be

(Testimony of Cyril Gregory Gips.)

checked in the laboratory in San Francisco, [144] they could not do that in Seattle, and I remember him asking me if that was satisfactory and agreed to that, that it would be satisfactory.

Q. Well now, after this conversation with him you stated that you made a computation and estimate. What was your estimate as to the cost of the inspection to be performed by Pittsburgh?

A. Well, it was—I remember the total figure being between four and six hundred dollars for the whole job. However, I made that on the basis of what I personally thought it could amount to; but, I figured about between four and six hundred dollars.

Q. Now, did you have any further talk with Mr. Clark prior to your wire to Seattle at about noon on May 15, 1952?

A. Yes. Well, that was the conversation I referred to before when——

Q. (Interposing): Just a minute. I want to fix the time and can you fix the time of it in reference to Plaintiff's Exhibit 11?

The Court: Which conversation are you speaking of now?

Mr. Morrow: This is the second [145] conversation.

Q. (By Mr. Morrow, Continuing): In other words, can you fix the time by referring to Plaintiff's Exhibit 11?

A. Yes, I can. I had actually been waiting to place the business with the Foundry or with either



(Testimony of Cyril Gregory Gips.)

one of the two bidders actually until such time that I had had a chance to look over the New Zealand Government's purchase order to check it with our figures, that everything was in order and all conditions were there, and I received that purchase order on May 15th and after I had checked it through I then had to proceed to place the order with any of the two bidders and inasmuch as we had decided to place the order with Seattle Foundry we automatically had to confirm the understanding and agreement and make a verbal agreement with Pittsburgh Testing Laboratory that if we did place the order that they would conduct the inspection and certification of the quality and that took place prior to my placing the order with the Seattle Foundry.

Q. Now, you say took place prior to your placing the order with Seattle Foundry. By your order you are referring, are you, to Plaintiff's [146] Exhibit 17? A. That is correct.

Q. Now, did the—in reference to Plaintiff's Exhibit 11, did the second conversation take place before or after you received your letter of transmittal and the New Zealand purchase order? That is Plaintiff's Exhibit 11, is it not?

A. I didn't quite catch the question.

Q. I am referring to Plaintiff's Exhibit 11 now.

A. Yes, sir.

Q. That is a letter of transmittal?

A. Yes, sir.

(Testimony of Cyril Gregory Gips.)

Q. Of a purchase order of the New Zealand Government Trade Commission, is it not?

A. That is correct.

Q. And your stamp shows that order was received on May 15th?      A. That is correct.

Q. And, by the way, May 15th was what day of the week?      A. Thursday.

Q. Have you checked that?      A. Thursday.

Q. Thursday; now, the question is: Was your conversation or telephone call with Mr. Clark [147] before or after you received Plaintiff's Exhibit 11? The second call now I am talking about.

A. Well, It may have been the third call. There may have been various calls but the one you are referring to was placed after I had received and checked this letter and its attachments.

Q. Well now, the telephone conversation that you had after receiving Plaintiff's Exhibit 11 and before sending out Plaintiff's Exhibit 17, what was that; what was the subject of that call, the substance of that conversation?

A. That was to confirm to Mr. Clark the previous conversation we had. In the first place, I told him that we were placing the business with Seattle Foundry, accepting their bid, and that I was going to inform the supplier that Pittsburgh Testing Laboratory was going to conduct the inspection and certification of the material. I did that purposefully, that if there were any objections on the side of the supplier that we would hear from him immediately without having to wait or hear about it later, so

(Testimony of Cyril Gregory Gips.)

that I made that a part and condition of my contract with Seattle Foundry and I concluded and confirmed our verbal with Mr. Clark to accept his offer of the inspection and certification before [148] I placed the order with Seattle Foundry.

Q. Now, did you have any occasion to meet any of the officials of the Pittsburgh Testing Laboratory about this same time?

A. Mr. Robinson, the manager of the Pittsburgh Testing Laboratory, came to pay us a visit, to meet us face to face, and——

Q. (Interposing): Just a minute. When was that?

A. That was after the—after I had placed the business with Seattle Foundry and had concluded the verbal arrangement with Mr. Clark.

Q. Do you recall the day or the date?

A. Well, I am quite sure it was the following Friday. It was an extremely busy afternoon and I think I even made my excuse about being very busy that afternoon. He came to visit just to talk to us and I took him in to meet Mr. Mahoney, vice president in charge of the merchandise department.

Q. On that occasion what discussion did you have with Mr. Robinson?

A. Well, we told him about what we had done and I showed him the letter of inquiry from the—from our Wasington office, the first letter.

Q. Just a minute. May I have Plaintiff's [149] Exhibit 1? I will ask you, Mr. Gips, if Plaintiff's

(Testimony of Cyril Gregory Gips.)

Exhibit 1 is the inquiry from your Washington office that you referred to?

A. Yes. That is the inquiry letter from our Washington office.

Q. Just go on and tell us what the discussion was that took place between you and Mr. Robinson on that occasion?

A. Well, Mr. Robinson just confirmed that that is what they were for and that that is what they could do, and thanked us for working with them and having contacted them and that they would do a good job for us and look after the thing and that is about all the conversation that took place. I mean, we did not discuss at that time, or had never discussed with Mr. Robinson, any particular terms as to rates or anything else. It was just a general discussion.

Q. Did you confirm your understanding with Mr. Robinson——

Mr. Gantt (Interposing): Objected to. I beg your pardon. Objection, your Honor.

The Court: Form of the question?

Mr. Gantt: The form of the question is leading and calls for a conclusion. [150]

The Court: It appears to be.

Mr. Morrow: Yes.

Q. (By Mr. Morrow, Continuing): Referring you to Plaintiff's Exhibit 21, Mr. Gips, I will ask you what this exhibit has to do with reference to your conversations with Mr. Robinson or Mr. Clark and Mr. Robinson?

(Testimony of Cyril Gregory Gips.)

A. That is the letter I wrote to confirm in writing the understanding we had with Pittsburgh Testing Laboratory to conduct the inspection and certification of the material.

Q. I believe I asked you yesterday whether that was your signature?

A. That is correct. It is my signature.

Q. It is your signature. Now, on May—let's see now—referring you to Plaintiff's Exhibit 22, which is the reply to Exhibit 21, I will ask you in reference to the second paragraph of the exhibit whether the prices quoted there are what you understood to be the prices quoted by Mr. Clark to you?

A. Yes. That is correct. That was the verbal agreement we had of the rates he had quoted me Previously. [151]

\* \* \*

Q. (By Mr. Morrow, Continuing): Mr. Gips, referring you to Plaintiff's Exhibit 4, will you advise us whether that document came to your attention and, if so, when?

The Court: May I inquire before you answer? That is exhibit what?

The Witness: 24.

Mr. Morrow: Did I misstate?

The Witness: You said 4; it is 24.

The Court: What is it, 24?

Mr. Morrow: Yes, number 24.

A. Will you restate the question?

Q. (By Mr. Morrow): Yes. The question is: In reference to Plaintiff's Exhibit 24, which you

(Testimony of Cyril Gregory Gips.)

have before you, did that document come to your attention?       A. Yes, it did.

Q. And when?       A. On May 20, 1952.

Q. Now, May 20, 1952, was what day of the week? It was a Tuesday, wasn't it? That is what I have anyway.

A. That would be Tuesday. Yes, it is [156] Tuesday.

Q. Tuesday?       A. Yes, sir.

Q. Now, what did—what enclosure did you receive with that document?

A. The here attached enclosure, a letter from the—a copy of a letter of the Seattle Foundry Company addressed to our Grace Seattle office.

Q. And does it refer to any other enclosure?

A. Well, there was enclosed a duplicate signed copy of our purchase order number 8881, which was returned.

Q. All right. Now I want to get that exhibit.

A. That is attached to Exhibit Number 19.

Q. It is attached to——

A. (Interposing): The copy of the purchase order.

Q. Oh.

A. That is the one that was returned.

Q. I see; well, I guess we got this on the wrong letter of transmittal. One is a duplicate returned.

A. Or am I mistaken?

Mr. Morrow: I would like permission to take the duplicate and put it with the other letter.

Mr. Savage: I have no objection. [157]

(Testimony of Cyril Gregory Gips.)

The Court: You better take a look at those first. Do you want to take a look at those?

Mr. Gantt: Yes, your Honor, I would.

The Witness: I believe I could explain that the original and duplicate copy were originally attached to that letter and when it was received by our Seattle office the duplicate would have been taken off and signed and attached to their letter and returned to us, so that actually it should be attached to both letters because it was first sent out on that letter and returned on this letter.

Mr. Morrow: Yes, it can stay on that exhibit. Actually, it was sent with the original and a duplicate was sent with the original letter to Seattle and the duplicate was sent back to San Francisco.

The Court: We better not get confused either with the statement of the witness. The witness has been explaining that what was enclosed was 24. Is that what you have there?

Mr. Gantt: No, this is 19 that I have here, your Honor.

The Court: Your testimony then is just as to what was enclosed with Exhibit 24, which was a letter which came to your attention on May [158] 20, 1952.

Q. (By Mr. Morrow): I will refer you to this, to Exhibit 19, to which two documents are attached, export department number 8881, one being an original and the other being a copy, and ask you if the copy is the purchase order which was returned to you with Exhibit—yes—24? Yes?

(Testimony of Cyril Gregory Gips.)

A. Yes, that is the duplicate and signed returned copy of our purchase order which was attached to——

Mr. Morrow: (Interposing): I am going to ask permission to take the duplicate and put it with the returned letter of transmittal. Is there any objection to that?

Mr. Gantt: Well, the only point, your Honor, is that there is no indication in Exhibit 19, which Counsel has been referring to, that they sent the purchase order down in duplicate.

The Court: I think it should remain as it is. We have the testimony.

Mr. Morrow: All right. He testified it was. O.K.

Q. (By Mr. Morrow): Now, in reference to Exhibit 24 and the [159] enclosures, what did you do in connection with the matters therein discussed after you received the same in San Francisco on the 20th?

A. I called Mr. Clark of Pittsburgh Testing Laboratory.

Q. What day did you call him?

A. Well, I can not state the exact date but it would have been May 20th, the date of receipt of the letter, the inquiry.

Q. And what was the subject of that telephone conversation?

A. Well, I informed him and told him that our Seattle office had the confirmation from the supplier that they would manufacture the material;



(Testimony of Cyril Gregory Gips.)

however, that they had contacted—that Seattle Foundry had contacted—Pittsburgh Testing in Seattle and did not have a copy of the ASTM specification and they asked us to confirm that the specification conformed with the composition as listed in the attached letter. I read him the letter, or the copy of the letter, we had received of the Seattle Foundry Company.

Q. Is that the enclosure to Plaintiff's Exhibit 24 that you are talking about?

A. That is correct, yes. That was a copy of [160] a letter from Seattle Foundry Company, May 16th.

Q. Did you read him the whole letter?

A. Yes.

Q. What conversation took place between you at that time?

A. I do recall having talked—to having discussed the first paragraph and I believe that was about taper and son, and later on about the chemical content as laid down in this letter, and——

Q. (Interposing): Did Mr. Clark give you——

The Court (Interposing): Just let him finish.

The Witness: Excuse me.

A. (Continued): and told him—I read him the letter and told him—what was required and he told me at that time he didn't have the specification right in front of him because it was an old fashioned, outdated, specification but that he would look it up and give me the answer for reply to our Seattle office.

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): And did you have—and was there anything else said on that occasion?

A. No. He called me back for the answer but he just stated he couldn't give me the answer [161] right there and then.

The Court: We will take a recess now if that is satisfactory to you.

Mr. Morrow: All right.

The Court: Court will recess for ten minutes.

(Whereupon, at 11:08 o'clock, a.m., a recess was had in the within-entitled and numbered cause until 11:21 o'clock a.m., November 30, 1955, at which time, Counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: You may proceed, Mr. Morrow.

Q. (By Mr. Morrow): Mr. Gips, we were referring to a telephone conversation you had with Mr. Clark following receipt of a letter of May 20th, on May 20, from your Seattle office, Plaintiff's Exhibit 24, and I believe that you testified that Mr. Clark called you back.

Now, did Mr. Clark give you information in connection with your inquiry made on May 20, 1952, in reference to Plaintiff's Exhibit 24?

A. Yes.

Mr. Gantt: Object to the form of the [162] question, your Honor.

Mr. Morrow: That is preliminary.

(Testimony of Cyril Gregory Gips.)

Q. (By Mr. Morrow): Did he give you information?

The Court: You stand on the objection?

Mr. Gantt: I stand on the objection.

The Court: I didn't get the answer.

(Whereupon, the following was read by the Reporter: "A. Yes.")

Mr. Gantt: I object to the question being leading and ask that the answer be stricken.

The Court: He may answer that question yes or no. The question is: Did he? The objection is overruled. I didn't get the answer.

(Whereupon, the following was read by the Reporter: "A. Yes.")

Q. (By Mr. Morrow, Continuing): Will you refer please to Plaintiff's Exhibit 25?

A. I have that.

Q. All right; in reference to the information which Mr. Clark gave you and your conversation with him in connection with Plaintiff's Exhibit 24, what [163] did you do with that information?

A. Mr. Clark gave me the answers to the inquiry proposed in the letter which I had read him and I quoted those answers in my letter of May 22nd to Grace Seattle to be passed on to Seattle Foundry and that is marked as Exhibit 25.

Mr. Morrow: Plaintiff's Exhibit 25. At this time, your Honor, I would like to read Plaintiff's Exhibit 25. It is in evidence. It has been admitted.

(Testimony of Cyril Gregory Gips.)

The Court: Yes.

Q. (By Mr. Morrow): By the way, Mr. Gips, is this your signature on Plaintiff's Exhibit 25?

A. Yes, it is.

Mr. Morrow: "May 22, 1952; W. R. Grace and Co., Seattle Washington. Steel Billets for New Zealand purchase order 8881. Gentlemen."

"Your letter 3270."

Q. (By Mr. Morrow): For reference, 3270 is Plaintiff's Exhibit 24? Is that correct?

A. That is Correct. [164]

\* \* \*

Q. What did Mr. Clark tell you in reference to a matter of specifications? You may refer to the exhibit which is in evidence, if that refreshes your recollection.

A. Yes. He told me that in answer to my question which was mailed in our Seattle office's letter that there was no copy of the specifications available in Seattle. He told me that he would supply their Seattle office with a copy of the specification and that he would ask him to keep the—inform the Seattle Foundry Company supplier as to what to do. He also gave me answers to the questions raised in the Seattle Foundry letter, which copy was attached to Exhibit 24, and I quoted those just the [166] way he told me over the 'phone and that is all I recall about that conversation.

Q. Yes; and I believe you said you related that to your Seattle office? A. Yes.

(Testimony of Cyril Gregory Gips.)

Q. Now, referring you to the enclosure attached to Plaintiff's Exhibit 24 and the pencil marks on that exhibit following the last paragraph, can you identify that writing?

A. Yes. That is my writing. Those were some of the notes I took down.

Q. Would you just read that, please, your notes that you took down?

A. "The depth of tapering must not exceed  $1/16$  or  $1/8$  inch of dimension up to a maximum of  $3/4$  of one inch."

Q. When did you take down that note?

A. That I took down during the conversation with Mr. Clark.

Q. Was that the information he gave you?

A. Yes. That is literally what he told me or dictated to me.

Mr. Morrow: Plaintiff's Exhibit 27?

(Whereupon, document was handed to Counsel by the Clerk.) [167]

Mr. Morrow: I would like to read this in evidence, your Honor. It has been admitted.

The Court: It has been admitted?

Mr. Morrow: Yes. [168]

\* \* \*

Q. (By Mr. Morrow): Mr. Gips, did Plaintiff's Exhibit 27, which I hand you, come to your attention in the San Francisco office?

A. Yes, it did.

(Testimony of Cyril Gregory Gips.)

Q. And what, if anything, did you do in connection with that?

A. I called again the Pittsburgh Testing Laboratory and read them the contents in the letter and asked them to—or to talk to Mr. Clark and asked Mr. Clark to verify and tell me what the answer to that was, what the clarification was.

Mr. Morrow: Plaintiff's Exhibit 28 has been admitted in evidence, your Honor, letter 9647. I would like to read it with permission of the Court.

The Court: All right. [169]

\* \* \*

Q. (By Mr. Morrow): I ask you, Mr. Gips, did this letter, Exhibit 28, come to your attention?

A. Yes; it was written by me.

Q. And when was it written by you in reference to the last previously mentioned call to Mr. Clark?

A. This was the answer I received.

Mr. Morrow: Strike that and let me rephrase my question.

Q. (By Mr. Morrow): In reference to this letter, that is exhibit 28; is that correct?

A. That is correct.

Q. Where did you get the information in that letter which you sent to Seattle?

A. I received that from Mr. Clark over the 'phone.

Q. About when?

A. Directly in answer to my inquiry when I read

(Testimony of Cyril Gregory Gips.)

him the contents of the letter I had received from Seattle, which is Exhibit 27. [170]

\* \* \*

Q. (By Mr. Morrow): Mr. Gips, referring you to Plaintiff's Exhibit 29, did that come to your attention? A. Yes, it did.

Q. And what did you do in connection with that?

A. Well, I called again Mr. Clark and told him that again the letter I had written—transcript of what he told me—was not understood and asked him what we could do to clarify this completely.

Q. And do you recall what he said?

A. Well, he mentioned he would refer this matter directly to his Seattle representative who would then clarify it with the Foundry.

Mr. Morrow: Now I would like to offer—this is Defendant's Exhibit 4, is it?

The Clerk: A-9.

Mr. Morrow: A-9, pardon me. Defendant's Exhibit A-9 in evidence. That is one of the exhibits listed as a Defendant's exhibit in the pretrial order.

Mr. Savage: Seattle Foundry has no objection.

The Court: Is there any objection?

Mr. Gantt: There is no objection to it, [172] your Honor. I don't think this witness can testify to anything about it.

Mr. Morrow: I don't intend to have him.

The Court: That comes in without objection, that exhibit, and you think it has some bearing to be let in now, do you, Mr. Morrow?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes, your Honor. Mr. Gips just testified that Mr. Clark said he would get in touch with a Seattle representative and this has to do with that.

The Court: All right.

(Defendant's Exhibit A-9 admitted.)

Mr. Morrow: I would like permission to read this.

"Pittsburgh Testing Laboratory, inter-office correspondence, order number SF 5799, Subject W. R. Grace and Company, file number" blank, "prospect number" blank, "To Seattle office from San Francisco office, date June 4, 1952, Attention of Mr. M. E. Johnson.

"Following is copy of paragraph from A-17/29 covering this:

"Chipping: (a) Billets may be chipped to remove surface defects, provided that the depth of chipping does [173] not exceed  $1/16$  in. for each inch of dimension concerned, up to a maximum depth of  $3/4$  in., and provided that the width of the chipping is at least four times its greatest depth; except that in the case of slabs where the width is at least twice the thickness, the depth of chipping on the wide surfaces may not exceed  $3/32$  in. for each inch of dimension concerned, up to a maximum depth of  $3/4$  in. (b) In special cases, particularly large alloy-steel billets where it is necessary and is not injurious, greater depth of chipping may be permitted by agreement between the manufacturer



(Testimony of Cyril Gregory Gips.)

and the purchaser. W. W. Clark. Received June 5, 1952, Pittsburgh Tes. Lab. Seattle Office.”

Plaintiff's Exhibit 30?

(Whereupon, a document was handed to Counsel by the Clerk.)

It has been admitted in evidence, your Honor.

The Court: All right.

Mr. Morrow: I would like to read it.

“G.C.S.F., G.C.Se.”

Q. (By Mr. Morrow): I will ask you, Mr. Gips, what that refers to?

A. Could you repeat it, Mr. Morrow?

Q. “G.C.S.F.”

A. That is a message directed to the San [174] Francisco office from the Seattle office. That means to Grace Company San Francisco from Grace Company Seattle.

Mr. Morrow: I see. 7/21/52, it appears to be, 4:00 o'clock sent. I can't quite make that out.

“Steel Billets.

“84 Seattle Foundry advise one heat consisting of 8 billet tested by them as not over .80 manganese but Pittsburgh test ran .85 manganese, both tests ran .21 carbon. Suppliers request we cable for buyers authority ship since more manganese actually makes stronger billet.”

I would like to refer to Plaintiff's Exhibit 31 which has been admitted in evidence.

Q. (By Mr. Morrow): I ask you, Mr. Gips, what that wire is and where it went—where it originated and where it was sent?

(Testimony of Cyril Gregory Gips.)

A. That was sent to the Seattle office and it originated in San Francisco.

Q. Who sent it?           A. May I read it?

Q. Well, I will read it. Who sent it through?

A. Which person?

Q. Yes, the person in San Francisco? [175]

A. I would have sent that.

Mr. Morrow: 7/21/52; 4:35 received.

“Steel billets for New Zealand. 50 steel billets your 84 please instruct Pittsburgh Test representative accept 8 billets however no further exceptions will be allowed in future.”

Q. (By Mr. Morrow): Now, Mr. Gips, in reference to receipt of Plaintiff's Exhibit 30, what did you do?

A. I called the Pittsburgh Testing Laboratory.

Q. Whom did you talk to?           A. Mr. Clark.

Q. What day was that?

A. The same day we received the message.

Q. Yes; what was the subject of your discussion with Mr. Clark on July 21st?

A. I told them about this wire. I read it to him and we discussed it and Mr. Clark advised me that, as it was stated in the wire, the higher manganese content would not actually be regarded as a defect of the steel but it was correct to say that it would strengthen the material and that he suggested that as far as his knowledge of steel went there was no objection to accepting such a higher manganese content provided it was not done [176] consistently,

(Testimony of Cyril Gregory Gips.)

just happened once, there was no objection against that.

Q. And is this Plaintiff's Exhibit 31 your reply to the Seattle office following your talk with Mr. Clark?

A. Yes. On that advice I took it upon myself to authorize that deviation and to accept the eight billets, pointing out that no other exceptions could be allowed.

Mr. Morrow: Plaintiff's Exhibit 34.

(Whereupon, document was handed to counsel by the clerk.)

This exhibit has been admitted in evidence, your Honor.

The Court: What number is that?

Mr. Morrow: 34.

The Court: Do you wish to read it? [177]

\* \* \*

Q. Now, where did you get your technical information in which to reply to that letter, Mr. Gips?

A. I spoke to Mr. Clark.

Q. You spoke to him? A. On the 'phone.

Q. Where did you get that?

A. I called him.

Q. Did you get the information from Mr. Clark?

A. Yes; he gave me that information. [180]

\* \* \*

Plaintiff's Exhibit 37 has been admitted in evidence.

(Testimony of Cyril Gregory Gips.)

The Court: All right. You may read it if you wish. [181]

\* \* \*

Q. (By Mr. Morrow): Mr. Gips, referring you to Plaintiff's Exhibit 37 which I have just read, the first invoice—there are other similar invoices—I will ask you if Plaintiff's Exhibit 37 came over your desk in San Francisco? A. Yes, it did.

Q. And do you know whether or not all of the invoices came over your desk?

A. Yes, they did.

Q. Did you indicate your approval of payment of the invoices?

A. Not in writing. If the invoice isn't approved by the person who had made the purchase, it is handed over without any accommodation unless there is a change or a difference; but, if it is approved as such it is handed over to the order clerk who stamps it and allocates the payment and sends it through to a vice president to be authorized for payment.

Q. What did you do on this occasion?

A. They were passed on to the order clerk—not immediately, though. Excuse me. There were some differences as to the amount of time spent on the inspection and—— [183]

Q. (Interposing): Pardon me for interrupting. I don't want to go into the question of any controversy over the statement, but I just simply want to, if you will, refer to the top one. Will you tell us

(Testimony of Cyril Gregory Gips.)

how that was handled for payment after it came over your desk?

A. Well, the amounts and rates are checked—were checked—by me and when found to be correct——

Q. (Interposing): Did you check this invoice?

A. Yes. [184]

\* \* \*

Q. (By Mr. Morrow): Mr. Gips, I will ask you to identify Plaintiff's Exhibit—which has been marked Plaintiff's Exhibit 51 for identification.

Mr. Morrow: I might say this is one of those exhibits, your Honor, under Admitted Fact [185] 50 which was admitted as being correspondence in the regular course of business.

The Court: That is Exhibit number what?

The Witness: 51, your Honor.

The Court: 51? You are asking him to identify it?

Mr. Morrow: Yes; yes.

Q. (By Mr. Morrow, continuing): Would you?

A. It is a letter from W. Grace and Company, Washington, to Grace and Company in San Francisco referring to steel billets.

Q. That is sufficient. Does it also refer to an enclosure? A. Yes.

Q. Handing you what has been marked Plaintiff's Exhibit 50—no, this isn't the one. What is the date of that letter, Mr. Gips?

A. October 29, 1953.

Q. Oh, yes, I will ask you to state whether or

(Testimony of Cyril Gregory Gips.)

not, if you can, Plaintiff's Exhibit 50, which has been so marked for identification, is the enclosure mentioned in 51?

A. Yes, that is correct. [186]

Q. Can you state whether or not those two documents came to your attention and, if so, when they first came to your attention?

A. These were received by me or read by me on November 2nd, the date of receipt.

Q. Now the exhibit, Plaintiff's Exhibit 50, what has that reference to? I don't want the contents of it but what has it reference to?

A. It sets forth the exact amount of——

Q. (Interposing): No. The claim?

A. It is the value of the claim.

Q. The value of the claim?

A. Not the claim itself.

Mr. Morrow: I see. I am sorry, your Honor, I had the wrong documents.

The Court: You mean 50 was the wrong document?

Mr. Morrow: The testimony—the identification is satisfactory for this, but these documents came after. I want to refer to a document dated May 15, 1953, which is Plaintiff's Exhibit 42. The document which Mr. Gips has identified is a letter of transmittal, has already been identified as a letter of transmittal, dated October 29th, transmitting the claim of the New Zealand [187] Government Trade Commissioner, dated October 26, 1953, stating the value. Now, prior to that we had another letter

(Testimony of Cyril Gregory Gips.)

from the New Zealand Government Trade Commissioner which has been admitted as being genuine and as being one of Grace's documents.

Q. (By Mr. Morrow): I will ask you, Mr. Gips, whether you can further identify Plaintiff's Exhibit 42?

A. This is a letter written by the New Zealand Government Trade Commissioner in Washington, D. C., to W. Grace and Company, Washington, D. C., filing notice of claim and with an explanation as to the claim of material delivered.

Q. Now, I ask you if that document came to your attention? A. That is correct.

Mr. Morrow: I will offer the Plaintiff's Exhibit 41—is it—in evidence.

The Witness: 42.

Mr. Morrow: 42 in evidence. [188]

\* \* \*

The Court: It may be received at this time for the limited purpose, namely, that there was a claim received in connection with the billets here involved.

(Plaintiff's Exhibit 42 admitted.)

Q. (By Mr. Morrow): Referring you to what has been marked Plaintiff's Exhibit 46, Mr. Gips, I will ask you if you can identify that?

A. I can. It is a letter written by W. Grace and Company, San Francisco, and addressed to Pittsburgh Testing Laboratory, dated May 22, 1953, and it is signed by me. It is a covering letter to a copy

(Testimony of Cyril Gregory Gips.)

of the New Zealand letter we had received pertaining to a claim which was the foregoing exhibit.

Mr. Morrow: I will offer the exhibit in evidence as Plaintiff's Exhibit 5 for the limited purpose of showing that the claim was submitted to the Pittsburgh Testing Laboratory under this letter of May 22, 1953, enclosing the claim of the [191] New Zealand Government Trade Commissioner of May 15th, being also in evidence as Plaintiff's Exhibit 42.

(Whereupon, Mr. Morrow conferred with Mr. Prince.)

Yes. That is 46. Will you correct that, Mr. Reporter?

Mr. Gantt: In that regard, your Honor, I don't want to delay with my point again. Our objection is that we have no objection if it is offered for the limited purpose of showing it was received and that a claim was sent to Pittsburgh, or a copy of the claim.

The Court: This claim.

Mr. Gantt: Yes; but not as to the truth of the matters alleged in 42.

The Court: I understand it is offered for that limited purpose.

Mr. Gantt: Yes.

The Court: And it may be admitted for that limited purpose.

(Plaintiff's Exhibit 46 admitted.)

Q. (By Mr. Morrow): Mr. Gips, with reference



(Testimony of Cyril Gregory Gips.)

to Plaintiff's [192] Exhibit 42 and Plaintiff's Exhibit 46, which I place before you, will you please state what you did upon receipt of the New Zealand Government Trade Commissioner's claim?

A. I read same through to acquaint myself with the contents as it appeared that the New Zealand Government alleged that the delivered material did not comply with their purchase from us. I checked the New Zealand purchase order with the—with our purchase to the Foundry and found no difference there and I then checked the—our purchase order—New Zealand Government's purchase order with the contract we had with Pittsburgh and there seemed no discrepancy there. I called Pittsburgh Testing Laboratory and——

Q. (Interposing): Now approximately when was that?

A. I couldn't pinpoint the day, but it was upon receipt of the claim of the New Zealand Government.

Q. When was it in respect to your transmitting the claim to Pittsburgh which is dated——

A. (Interposing): The date we received New Zealand's claim, Exhibit Number 42, was probably received approximately May 19th—around [193] there. That is approximately the date, or it may have been the next day. I do not know if there were any Saturdays or Sundays involved there, but I called Pittsburgh Testing Laboratory and I advised them that we had received a letter claim—filing the claim—notice of claim—on the merchandise

(Testimony of Cyril Gregory Gips.)

which we had delivered and which they had inspected and guaranteed to be in conformity with our purchase order and contracts and I did not attempt to read the whole letter.

We arranged a meeting in the office of Pittsburgh Testing Laboratory and I went down there and spoke to Mr. Robinson and Mr. Clark and showed them the letter, which is here as Exhibit Number 42, and it was decided that they could not immediately check upon everything, this being a very long and complicated letter, and Mr. Clark said that he would check it with the specifications in the book he had on specifications and I remember going with him to his office and we looked for a specification and we couldn't find one at that moment and he asked me to give him a copy of the claim, which I promised and which I did, and sent one to him under cover of my letter of May 22nd.

Q. And which Exhibit Number is that you [194] are referring to?

A. It is Exhibit number 46, which enclosed a copy of a letter which I had previously shown to them. In that covering letter I requested him to advise me the reasons why there was the possibility of a claim inasmuch as they had inspected the material before we had it shipped out.

Mr. Morrow: May I have Plaintiff's Exhibit 49?

(Whereupon, document was handed to Counsel by the Clerk.)

Has this been admitted?

(Testimony of Cyril Gregory Gips.)

The Clerk: Yes.

Mr. Morrow: Plaintiff's Exhibit 49 has been admitted, your Honor, and I would like to read it.

The Court: Yes. [195]

\* \* \*

Now I would like to offer in evidence Plaintiff's Exhibit 51 and Plaintiff's Exhibit 50. Plaintiff's Exhibit 51 has been identified as a letter of transmittal submitting the claim of the New Zealand Government Trade Commissioner and setting forth details of computation and the valuation of their claim.

The Court: Is this 51?

Mr. Morrow: This is Exhibit 50, the letter, the New Zealand Government Trade Commissioner letter and 51 is the letter of transmittal.

Mr. Gantt: If the Court please, the same objection made to Exhibits 51 and 50 as was made to Exhibits 42 and 46. That is, that if the exhibits are offered to prove the truth of the matters therein stated, we object to their being so offered. There is not an objection to their being offered for the limited purpose of showing that they were received by Grace and Company in San Francisco or in Washington, for that matter. I think number 50 is—our reasons for that objection were those stated in the prior objection. They are not business records of Grace and Company.

The Court: Do I understand that you would not object to the exhibit—this is 50, which is [197] the

(Testimony of Cyril Gregory Gips.)

letter signed by—presumably by—one Wooder, the Trade Commissioner for the New Zealand Government Trade Commission, addressed to Grace in Washington—you would not object that a claim in an amount set forth in there was made?

Mr. Gantt: No, we would not object on that ground, to show the claim.

Mr. Morrow: I will offer them for that limited purpose at this time. In respect to both of these documents and the other documents, I, of course, wish to reserve the right to offer them for other purposes.

The Court: If offered for another purpose we have another question.

Mr. Gantt: Surely.

The Court: Plaintiff's Exhibits 50 and 51 may be admitted for the limited purpose as stated at this time.

(Plaintiff's Exhibits 50 and 51 admitted.)

Mr. Morrow: I would like to offer Plaintiff's Exhibit 52 in evidence at this time for the limited purpose of showing the amounts, or the amount, of the revised claim of the New Zealand Government Trade Commissioner to Grace and [198] Company, dated August 6, 1954.

Mr. Gantt: The same objection in that we do not object to its being offered for the limited purpose of showing that a claim was received in that amount stated in the letter, August 6th, being Exhibit 52.

The Court: That is the purpose at this time?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Yes.

The Court: All right; it may be admitted at this time for that limited purpose.

(Plaintiff's Exhibit 52 admitted.)

It is the revised claim, is it?

Mr. Morrow: Yes.

The Court: It is revised?

Mr. Morrow: Yes, that is a revised claim. Simply, the revised claim, your Honor, is \$21,747.24, which is the amount which was paid by the Grace and Company under, I believe, the admitted facts. That is all the questions I have from Mr. Gips at this time.

Cross-Examination

By Mr. Gantt:

Q. Mr. Gips, when did you say, sir, you [199] came to work for the Grace and Company; first started work? A. I beg pardon?

Q. When did you first start to work for them?

A. I believe it was approximately July of 1951.

Q. What had been your experience in the export business prior to that; how many years, approximately? A. Approximately four years.

Q. Most of that in South America, was it?

A. That is correct.

Q. Any of it in the United States?

A. No; no.

Q. Are you an American citizen?

A. I am not.

(Testimony of Cyril Gregory Gips.)

Q. You are? A. I am not.

Q. How many years have you been living in the United States?

A. Approximately four and a half years.

Q. And what nationality are you, sir?

A. I am a Dutchman.

Q. Who is your superior or who was your [200] superior in the period that you have been testifying to; superior in Grace and Company during the period, say, April through July, 1952?

A. Mr. G. H. Mahoney.

Q. What was his then title down there?

A. At that time it was under the company's title of W. Grace and Company; he was manager.

Q. And he was your immediate superior?

A. That is correct.

Q. Did you discuss the matter relating to this inquiry from Washington, which is Exhibit 1, with Mr. Mahoney? A. I beg your pardon, sir?

Q. Did you discuss Plaintiff's Exhibit 1, which is the inquiry, dated April 3, 1952, with Mr. Mahoney upon receipt of it by you?

A. I believe I did. I am not quite sure but I think I did.

Q. Did you consult with Mr. Mahoney from time to time during the transaction?

A. I do remember having consulted him when we received a second offer on the same inquiry from our Seattle office, which was the offer of Seattle Foundry Company.

Q. Now, I believe you testified that you [201]

(Testimony of Cyril Gregory Gips.)

had, prior to the receipt of this letter in April, 1952, Exhibit 1, you had had other steel transactions?

A. That is correct.

Q. In the export department in San Francisco?

A. That is correct.

Q. And I believe you testified that they related to the purchase by Grace to fill orders of steel bars and what was the other product?

A. Steel pipe.

Q. And I also think you testified that they called for steel according to certain specifications?

A. That is correct.

Q. What were those specifications, if you recall?

A. I recall they were an ASTM specification but I could not give you the number.

Q. But they were a particular ASTM specification?

A. Yes; that is correct.

Q. How many such transactions would you say that you had had dealing in steel pipe or bars for W. R. Grace prior to this matter in dispute here?

A. It is very hard to give you any exact [202] idea but I would say about one dozen, perhaps; six to a dozen.

Q. And in any of those transactions had you occasion to consult the specifications yourself?

A. No, we do not consult specifications.

Q. Did you have occasion to discuss the subject of the specifications with the experts, with any expert, on the subject such as an engineer?

A. No, we do not. We pass—most of those inquiries are not passed on to us with the specifica-

(Testimony of Cyril Gregory Gips.)

tions. Some of them are and if the specifications are given to us we just pass it on with the purchase order to the supplier.

Q. So then, other than reference to a particular specification, you don't really know what you are ordering, do you?

A. Yes, we do. We give a description of the material, the way it is ordered, and we put in the specification it is ordered from us. That is exactly the way, verbatim, that we pass it on, to our supplier.

Q. Now, Mr. Gips, when you first received Exhibit 1, which is the letter of April 3rd, from your Washington office, in that letter, I believe, if you will refer to Plaintiff's Exhibit 1, you will see [203] under the description of the billets on the second line there the phrase "or nearest equivalent"?

A. That is correct.

Q. In other words, reading from Exhibit 1 it states:

"Steel billets, specification ASTM, type A, grade two, or nearest equivalent"?

A. That is correct.

Q. And I believe it says the same for item two, relating to the other size. Now, what is the meaning of "or nearest equivalent," or do you know?

A. Well, that would be a question for probably an expert to answer. I could not tell you what the nearest equivalent to that question is. If it would be required of me to answer it, I would call upon an expert to answer it for me.



(Testimony of Cyril Gregory Gips.)

Q. You didn't do that in this case?

A. No, I did not. I believe I never did use that term in any of my contacts, "or nearest equivalent." If I had, I would probably have identified the nearest equivalent by consulting an expert.

Q. Handing you Plaintiff's Exhibit Number 2, will you read the description of the billets? First, tell us what is this exhibit again?

A. It is number 45. [204]

Q. No, at the bottom. It is Exhibit 2 in this case, but what is it? A. Excuse me.

Q. It is a letter signed by you, is it?

A. It is a letter signed by me.

Q. To your Seattle office?

A. Referring to steel billets, addressed to Grace, Seattle office.

Q. And will you observe there whether the phrase "nearest equivalent" appears in the description of the billets?

A. It does. However, it is not a contract.

Q. I didn't ask you whether it was a contract. I just asked you whether it appears there.

A. It appears there.

Q. Read how it appears in the first instance.

A. "Steel billets, specification A-17/29, type A, Grade 2, or nearest equivalent."

Q. Now, you used the phrase then in that letter and did you know what the nearest equivalent was then? A. No, I did not.

Q. Now, I believe you testified that upon receiving the Exhibit 1 you shortly thereafter sent [205]

(Testimony of Cyril Gregory Gips.)

off Exhibit 2, but prior to sending off Exhibit 2, being the letter of April 17th, you contacted a friend of yours named Mr. Gleason at Kaiser Steel?

A. That is correct.

Q. What was his position over there at that time?

A. He was—I believe he still is—the export manager for Kaiser Steel.

Q. Export manager?

A. Export manager. The only business I conducted with him was on steel pipes. I do not know if he also handles other materials for Kaiser for export.

The Court: Did you say export?

The Witness: Export items.

The Court: I see.

Q. (By Mr. Gantt): Now, will you try to tell us what your conversation with Mr. Gleason was at that time?

A. I advised him that we had an inquiry for steel billets. I may have read him the inquiring letter and asked him if he knew of a possible supplier for this type of material, if he could advise me whom to contact, and he mentioned to me two companies up in the Northwest which he thought [206] might be able to do such work and he told me to contact them.

Q. Did you discuss with him getting the work done or getting the product produced from someone in the San Francisco Bay area?

A. Yes, I did ask him if there were no sup-

(Testimony of Cyril Gregory Gips.)

pliers in Northern California or Southern California who might be able to furnish this material.

Q. What did he say?

A. He told me that as far as he knew there were no suppliers available that were at that moment in a position to furnish that material.

Q. When you say were not at that moment in a position to furnish that material, who do you mean by that?

A. Well, at that moment there was a steel shortage and many steel mills were over booked and producing, I understand, in capacity. It was difficult to get on a mill schedule, get a mill, steel mill, to offer you material. Most people at that time, and particularly for export, were allocated certain quantities of steel which they could export. They could not export unlimited quantities.

Q. Now, there are other large steel suppliers in the San Francisco Bay area that you are [207] aware of?

A. For different items there are all sorts of steel suppliers in the Bay area.

Q. There are steel rolling mills? In the Bay area?

A. Well, I am not aware but possibly people like Bethlehem. I do not know if U. S. Steel has a rolling mill there. I am not too well acquainted with their facilities. I do know they work in that area but I do not know if they have facilities to roll material or anything like that.

(Testimony of Cyril Gregory Gips.)

Q. You did not inquire of any other steel supplier in the San Francisco area?

A. Well, we used to, I understand, although I personally never exported any of their materials—used to ask upon those from Kaiser, with people like U. S. Steel and Bethlehem on different items, barbed wire and things like that, but for many years during the war and postwar years those big companies were so overloaded with orders that they did not take any order for export at all unless it was possibly for one of their own representatives.

Q. The fact is you didn't call any of those others?

A. No, because they had systematically [208] declined to make any offers on steel material.

Q. Did you have any correspondence with any steel suppliers in the San Francisco area as a result of the letter of inquiry from your Washington office?      A. No.

Q. Now, did you discuss at all with Mr. Gleason the product that you were seeking to obtain to fill the order for the New Zealand Government?

A. I gave them the product that was required as it states on the letter from Washington inquiry and I just told them this is the type of material we are supposed to quote on and who do you think can manufacture this type.

Q. Was there any discussion as to what the type of material was or how it was to be manufactured?

A. I don't think so.

Q. You say you don't think so?

(Testimony of Cyril Gregory Gips.)

A. I am quite sure we didn't discuss that.

Q. Now, Mr. Gips, the first indication that you had of any supplier on this order you received in the letter of May 1st from Mr. Schlaugh, Exhibit 5, is that correct—the letter referring to Isaacson and Seidelhuber? [209]

A. That is correct.

Q. And you took that to be a firm offer from Seidelhuber?

A. Yes, it was a firm offer.

Q. From Isaacson, I beg your pardon?

A. Yes, it was a firm offer from Isaacson.

Q. You will notice in this letter, paragraph two, relating to Seidelhuber and Isaacson:

“Seidelhuber Iron and Bronze Works, Seattle, advise they would be able to offer forging quality ingots which will have the quality of steel billets. They would not be able to offer sizes specified but could offer them in sizes 12" by 12" in lengths up to 54", 20" by 20" up to 70" and 25" by 25" up to 59". They would like to know for what part of the locomotive these billets are required and would like to know if forging quality ingots will suffice. They are not on strike but do advise that they will probably be out of the market within three weeks inasmuch as there is now a huge demand.”

Did you do anything about the reference to the Seidelhuber quotation or the Seidelhuber reference which is made or contained in this letter?

A. No, I did not.

Q. You didn't consult anyone as to what [210] quality forging ingots were?

A. No.

Q. Or forging quality ingots?

A. No.

(Testimony of Cyril Gregory Gips.)

Q. Which would have the quality of steel billets?

A. No.

Q. Was this letter put in your file in San Francisco?

A. No, I used that letter, the first part of that letter, for the Isaacson quotation. I kept it as such on my desk with my current papers.

Q. Would you say that was part of a file on this matter?

A. Oh, yes, I kept it with my papers attached to the letter and inquiry from Washington.

Q. But you made no inquiry about forging quality ingots? A. No.

Q. Now, other than Mr. Gleason referring you to Isaacson Iron Works, did you have any reason to know or to do business with Isaacson Iron Works prior to your letter here?

A. If I had done any business with them?

Q. Yes. [211]

A. No, I had done no business with them.

Q. And did you know them in any other way other than Mr. Gleason having referred you to them?

A. No. He referred to them as being one of the best known and largest steel manufacturers in the Northwest.

Q. How did he refer to Seidelhuber?

A. Also as a reliable supplier.

Q. You didn't know them other than that?

A. I didn't know them.

Q. Now, you stated that upon receiving Plain-

(Testimony of Cyril Gregory Gips.)

tiff's Exhibit 5 you thereupon got off your letter to Washington and the letter that you wrote to Washington—your Washington office—was Exhibit 8, the letter of May 6th, is that correct, in which you quoted the Isaacson price?       A. Yes.

Q. Now, I would like to refer to the method by which you computed the price which you were offering to your Washington office. In other words, the Isaacson order which Mr. Schlaugh sent you in Exhibit 5, the Isaacson offer, was for 750 billets at \$157.50? You will note that in Exhibit 5.

A. Yes.

Q. And then in Exhibit 8 you have quoted [212] a price to your Washington office of 750 billets at a price of \$168.35. In other words, there is a difference there of approximately eleven dollars?

A. Yes.

Q. Ten or eleven dollars; what is that difference? How did you make up that difference and how did you compute the price appearing in your Exhibit 8?

A. The price of \$157.50 was, of course, the base price and then we have to add on charges to—dock charges to make it on an F.A.S. schedule, dock basis, on which basis we are offering.

Then we add on our margin and that was in this case—because we like to have as large a possible margin as we can obtain, but we felt we couldn't get more than five per cent on it at the most being more or less competitive and standing a chance of getting the business, and we have to add one addi-

(Testimony of Cyril Gregory Gips.)

tional per cent for our Seattle office from whose territory it would be supplied and who would demand a purchase commission which is usually one per cent.

Q. I want to refer you, for a moment, to Exhibit 5 and the price that Mr. Schlaugh quoted you for Isaacson has a figure for F.A.S. Your figure [213] was F.A.S., which means free aboard ship?

A. Freight alongside ship.

Q. Seattle? A. Yes.

Q. Did he give you a figure?

A. He gave me a figure F.O.B. car dock. That is, usually the manufacturer puts the merchandise on a railroad car and ships it for his expense and account to the dock but once on the dock it has to be discharged and handled and there are tolls involved on the piers before it becomes alongside the vessel, and that he refers to. He says, "Add \$1.32 per two thousand pounds for F.A.S. Seattle." He indicates that the tolls and handling charges on the dock amount to \$1.32.

Q. Then you added \$1.32 per ton?

A. That is correct.

Q. To the \$157.50 appearing in Mr. Schlaugh's letter, Exhibit 5? A. That is correct.

Q. Right? A. Yes.

Q. And the difference between \$1.32 and \$157.50 and the price which you quoted Washington, is that all profit? [214] A. Well——

Q. (Interposing): That is all gross profit, isn't it?



(Testimony of Cyril Gregory Gips.)

A. We may have had—you see, there are other expenses involved. There is a matter of making documents, of wires, cables, and so on. I may have taken a fixed charged for that and thrown that in on a total quantity, you see?

Q. Is it usual to write in such a fixed charge?

A. Oh, yes, we always add on a fixed charge that we throw in for cables, wires, expenses of making up documents.

Q. How was that computed? How was that computed here?

A. It depends much on the merchandise you are handling because the charges are all more or less the same; on how many shipments you are going to make because each time you make a shipment you start running into the same expenses. If you make one shipment you have the expenses once but if you make three shipments you have three times that expense, so that, inasmuch as you don't always know whether you will make one or two shipments on it, or maybe a large one, because [215] there may not be space available, or the merchandise may not be ready at the one time, you take it on the thicker side and throw in twice the amount you would take for one shipment.

Q. You don't know how much that fixed charge you added here was?

A. Well, I haven't—if you want me to, I can compute it back and see what was in there but I wouldn't remember offhand what I used at that time.

(Testimony of Cyril Gregory Gips.)

Q. Now, Mr. Gips, I want to show you Exhibit 9 for a moment, which is the letter of May 8, 1952, from Mr. Schlaugh to yourself, or to your Grace office in San Francisco. That letter, I believe you have testified, was the first price quotation you had received from Seattle Foundry through Mr. Schlaugh; is that correct? A. Yes.

Q. These are the Seattle Foundry prices?

A. Yes.

Q. Now, let's examine for a moment those prices. The larger item here of 750 billets, what was the price quoted by Seattle Foundry as quoted by Mr. Schlaugh?

A. \$120 per net ton. [216]

Q. As against the Isaacson price of \$157.50. Now, that is \$37.50 per net ton, isn't it?

A. Difference?

Q. Difference. A. Yes.

Q. Lower? A. That is correct.

Q. Did you have occasion to compute at the time you had these two offers what that difference would amount to in profit? A. Yes.

Q. In other words, you wrote your letter on to Washington setting the price at \$168, is it?

A. You took the papers.

Q. \$168.35 is the figure you have for F.A.S. Seattle? A. Yes, \$168.35.

Q. So then the Seattle Foundry price to you was going to be \$120 a ton on this larger item of billets as against the quote that you had sent to your Washington office of \$168.35; right?

(Testimony of Cyril Gregory Gips.)

A. Yes. Well, excuse me for interrupting you but this is price per net ton F.O.B. Foundry and then to that you add on the additional \$3.00 so that it is actually \$123.00 F.O.S. basis as against [217] the other one also F.A.S. basis.

Q. In other words, you had to consider at that time Isaacson's price of \$157.50 and Foundry's price of \$123.00? A. Yes.

Q. So that there is a difference of about \$34 or \$35 per net ton? A. Approximately.

Q. So that now, what would that have worked out on a profit basis to Grace then?

A. Considerably higher amount of profit.

Q. When you say considerable, I think you said you had worked that out at one time. Do you recall what the difference was for the whole order? That is a gross profit figure now.

A. Well, offhand—I know I have calculated it but I couldn't tell you.

Q. Could it have been six or seven or eight thousand dollars; could it be that much?

A. Oh, yes, it could be on the total order.

Q. That is just on the total order?

A. The total profit if one took the cost of Seattle Foundry's offer as against the selling price we quoted Washington.

Q. Yes, that is what I am driving at. [218]

A. Yes.

Q. Now, didn't—weren't you concerned over the difference in price? A. A little bit, yes.

Q. Weren't you just a little bit more than a lit-

(Testimony of Cyril Gregory Gips.)

tle bit? In other words, you are in the export business?      A. Yes.

Q. And you had been in the export business for four years, approximately four years, before this and here you had an item which was referred to by standard specifications to obtain inquiries on and you were getting two answers to your inquiry from the same city—in other words, Seattle?

A. Yes.

Q. And one of them was from a reliable firm or what had been told to you to be a reliable firm?

A. Yes.

Q. For a price that was about \$35.00 a ton difference?      A. That is correct.

Q. Amounting then, as you say, to as high as six, seven or eight thousand dollars; wasn't that an unusual profit or an unusually big differential between those two price quotations? [219]

A. I wouldn't say the profit because at that moment we hadn't sold the merchandise yet.

Q. Strike that—but an unusually large price differential in the price offered?

A. Yes, it seems rather large.

Q. In fact, in the years you have been in the export business have you ever seen one that varied that much?      A. I have seen them, yes.

Q. You have seen them?      A. Yes.

Q. Do you recall anything specifically like that?

A. One may find it in certain commodities—in lumber.

(Testimony of Cyril Gregory Gips.)

Q. Have you ever seen that big a variation in steel?

A. No, not in steel. I have always bought steel more or less at a fixed price and never had to dicker for a price.

Q. Now, then, there is another paragraph in this letter of May 8th. At the bottom it says—this is Exhibit 9—these billets are cast steel from sand molds and item two will weight 515 pounds each and—item one, 515 pounds each, and item two 475 pounds [220] each—these are from sand molds—that appears in that letter that Mr. Schlaugh wrote you? A. Yes.

Q. In the last paragraph of Exhibit 9?

A. Yes.

Q. Now, does that mean anything to you?

Mr. Morrow: I wish to object to this question. It is not a question or issue brought out on the direct examination. The testimony that is sought to be elicited now may be admissible for some purpose but I wish to make the objection that if it is being offered or attempt is being made to use it for the purpose of contradicting the written contract between the Grace Company and the Pittsburgh Company, then I must object.

The Court: Well, the exhibit is in and he said he received it and now he is asking about the contents of it.

Mr. Gantt: He testified on direct. In fact, it was let in over objection.

The Court: Objection overruled.

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: May the Reporter read the question?

The Court: The Reporter will read the [221] question.

(Whereupon, the following was read by the Reporter: "Q. Now, does that mean anything to you?")

The Court: Is the question: "Did it mean anything to you," Mr. Gantt?

Q. (By Mr. Gantt, continuing): Did it mean anything to you?

A. Just the phrase, "These billets are cast from sand molds"?

Q. Yes.

A. No, it did not mean anything to me.

Q. Did you do anything about it at that time?

A. No.

Q. Did you discuss it with Mr. Mahoney?

A. No, I did not.

Q. Did you discuss the price differential with Mr. Mahoney? A. I did.

Q. What did he say to you, if you recall?

A. A thing like that one, it seemed rather strange to me there was such a large difference and I suggested we should check back with the suppliers, that they are offering the same material and that they have made no mistake in the computation of their offer to us. It is always possible. I [222] have seen it happen time and again, somebody offers you something and it seems rather a strange difference, sometimes very high and sometimes very

(Testimony of Cyril Gregory Gips.)

low, above or below the market price, and upon checking they find they made an error somewhere in their calculations and adjust it, and whenever possible we always try to have that adjusted before we go in and finalize the business.

Q. Now, was this letter, Plaintiff's Exhibit 9, that you have just been testifying to, was that put in your file on this transaction, too? A. Yes.

Q. Now, with regard to the date you received the New Zealand Government's purchase order, which is exhibit—Plaintiff's Exhibit—11——

(Whereupon, document was handed to the witness by Counsel.)

A. Thank you.

Q. I think you have testified you received that on what date? A. On May 15, 1952.

Q. And now the prices contained in the New Zealand Government's purchase order to you, being attached here to Exhibit 9, were those prices in accordance with the letter that you had written to [223] your Washington office, being Exhibit 5?

A. Excuse me, I have to check.

Q. Will you just look at them and check? They are the same?

A. Yes, they are the same.

Q. So then your order to the New Zealand Government was based on the prices, was prepared and based on the prices, you had received from Isaacson Iron Works? A. That is correct, yes.

(Testimony of Cyril Gregory Gips.)

Q. And you just testified you received this exhibit, this letter, from Washington on the 13th?

A. 15th; it was written on the 13th and received on the 15th.

Q. I see; now, you testified earlier that you had occasion to call this Mr. Gleason again with regard to obtaining an inspection on the products you were going to get from the Foundry? A. Yes.

Q. And I believe you testified that you contacted Mr. Gleason some time after the 9th and before—some time after the 12th and before the 15th?

A. That is correct.

Q. At the time you discussed the matter of obtaining someone to give you an inspection [224] with Mr. Gleason did you go into the question of the price differential between these two offers?

A. Excuse me, with Mr. Gleason?

Q. Yes. A. No; no, I wouldn't.

Q. You were considering those two offers at the time, you testified, the Isaacson offer and Foundry's? A. Definitely, yes.

Q. You did not discuss the price differential?

A. No.

Q. Did you discuss the product at all again with him? A. No.

Q. As to what the product was to be; how it was to be manufactured? A. No.

Q. Did you at that time discuss specifications with him? A. No, I did not.

Q. Now, did you at any time obtain a credit report on the Foundry?



(Testimony of Cyril Gregory Gips.)

A. I have seen one. I do not think I obtained it. If I remember correctly, there was one sent on by our Seattle office here to San Francisco [225] and I——

The Court (Interposing): Was this before; you are talking now about before the contract was entered into?

Mr. Gantt: Yes.

The Witness: No, I had not seen one. The one I have seen was much later.

Q. (By Mr. Gantt): Did you at any time obtain or request—did you request—a credit report on Seattle Foundry?

A. I may have but I frankly do not remember having done so. I don't think I had one.

Q. Do you know whether the Seattle office of Grace obtained a credit report?

A. I know they obtained one later on. I don't know when they applied for it but I know later on we received a copy of it.

Q. Did that come to you in San Francisco?

A. That is right. They forwarded it to us.

Q. Now, did you ever acknowledge receipt of the New Zealand Government's purchase order attached to Exhibit 11? I mean by that, did you ever acknowledge receipt to your Washington office or to the New Zealand Government Trade Commissioner in Washington?

A. I don't think I did. It would not be up [226] to us to do so. I may have but I do not remember it unless the files would so show. I don't think I

(Testimony of Cyril Gregory Gips.)

did. Excuse me, perhaps I could tell. Apparently, it looks here I answered them on May 20th. It would look that way but I don't know what that would refer to.

Q. Do you usually acknowledge receipt of purchase orders?

A. Not necessarily. We usually—after we have been trading with a client back and forth and he finally agrees to the material and price and conditions of sale, we obtain a purchase order. We do not necessarily make up a—in the case of the government we do not make up a counter contract like we would with a commercial house. In that case we would make up a contract with them and make them sign it, that we have sold them such and such merchandise, on such and such terms, but you do not do that with the government because the government does not recognize your contract. They have their own purchase orders and they regard that as final.

Q. And your purchase order here was the New Zealand Government Trade Commission form, wasn't it? [227]

A. Yes, that is right.

Q. That was his form?

A. Yes.

Q. Now——

The Court: Would you like to take a recess now?

Mr. Gantt: Yes, that is all right with me.

The Court: The Court will take a fifteen-minute recess.

(Testimony of Cyril Gregory Gips.)

(Whereupon, at 3:15 o'clock p.m. a recess was had in the within-entitled and numbered cause until 3:31 o'clock p.m., November 30, 1955, at which time Counsel, heretofore noted being present, the following proceedings were had, to wit.)

The Court: You may proceed.

Q. (By Mr. Gantt, continuing): Mr. Gips, again referring to your telephone conversations with Mr. Gleason at Kaiser, did you have occasion in either of those telephone conversations to mention Seattle Foundry or that you were considering having Seattle Foundry fill the order?

A. No, I don't think so.

Q. In the second conversation concerning [228] getting an inspector you didn't mention Seattle Foundry either?

A. I don't think so. I cannot be sure. It was several years ago. There was no need to mention it so that I don't believe I did.

Q. Did you explain to him why you wanted an inspector?

A. I don't think so either. I just asked him that we required a reliable inspection service for—I recalled to him the previous conversation when I asked for suppliers of this type of material and said, "We now require an inspection service for this order and would like to know do you happen to know anybody that does this type of business?"

(Testimony of Cyril Gregory Gips.)

At that time he mentioned Pittsburgh Testing Laboratory.

Q. Now, Mr. Gips, when you received Exhibit 8 from Mr. Schlaugh, being a letter of May 6th referring you to——

Mr. Gantt: Strike that. That is incorrect. It is Exhibit 9.

Q. (By Mr. Gantt, continuing): ——in which Mr. Schlaugh made the quotations from the Foundry offer? A. Yes.

Q. Mr. Schlaugh's letter? [229] A. Yes.

Q. What is the date of it again?

A. It is dated the 8th of May, received on the 9th.

Q. Did you do anything about—at the time of receipt of that letter from Mr. Schlaugh you had sent out the letter of May 6th to Washington setting for the Isaacson price?

A. I know I sent that one.

Q. After receipt of this letter from Mr. Schlaugh regarding the Foundry prices, which you testified were considerably lower——

A. (Interposing): Yes.

Q. (Continuing): ——did you do anything about passing that information on to Washington in the form of a new order?

A. No. I did not.

Q. Or a new quotation of a lower price?

A. No.

Q. Why didn't you?

A. Well, on May 9th I recall—if I could refer

(Testimony of Cyril Gregory Gips.)

to the exhibits—I believe on May 9th we received a wire at the start of business from Washington and I don't know if it was exactly that wire—I believe there were two wires and one of [230] them states that they expected to mail us the order by Monday. Am I correct there again?

Q. I am looking.

A. That is the reason I would not at that time have interfered with my earlier quotation—because there was no need to do so.

Q. Well, Exhibit 10 refers to a letter by you to your Seattle office and you say, “We have received a telegram from our Washington office informing us they expect to close the sale on the 12th.” Is that the wire you are talking about?

A. This is the letter. I was referring to the wire I had received on the same day as this letter, this quotation.

Q. I see.

A. You will find it in the exhibits. I don't remember the number of the exhibit.

Q. Am I correct in assuming you did not tell your Washington office of the lower price from Foundry?

A. No. I do remember having mentioned in one of my—in my original offer to them it was based on a quotation from Isaacson Iron Workers and I mentioned later in a letter to them that if they had not previously mentioned to the client who the supplier [231] was that there was a possibility that we would change suppliers. I did mention that in

(Testimony of Cyril Gregory Gips.)

one of my letters to Washington on or about that period.

Q. Well, now, that is not this Exhibit 8, the letter of May 6th, in which you advise them of the Isaacson offer?

A. No. This is the letter—the offer—I made on the basis of the Isaacson offer or bid.

Q. Yes.

A. And there is a later letter. Perhaps it is also of the 9th of May, to Washington. I haven't got it in front of me.

Mr. Morrow: I sorry, Mr. Gantt. I have a copy of that letter which just came to our attention and I have no objection. I intended to put it in evidence later. You may use it.

Mr. Gantt: Will the Court excuse me just a second while I take a look? We have never seen it before.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Mr. Gips, I would like to show you what I believe has been marked Exhibit 20, which is a letter dated May 16th, addressed to Seattle Foundry, signed by Mr. Vanderbilt. Will you examine that [232] Exhibit 20 and tell me when you first—when it first came to your attention?

A. Mr. Gantt, I think that I did not see this letter until after the claim was filed by the New Zealand Government. This is a letter, as you say, from Grace Seattle to Seattle Foundry. I don't think I did see a copy of this letter within a year after it was dated.

(Testimony of Cyril Gregory Gips.)

Q. I see; now, you have previously identified one of the exhibits as being your purchase order. You referred to it in Exhibit 19, being dated May 15th, as a purchase order and I think you have identified your signature on the bottom of it.

A. Yes.

Q. That is your purchase order from your San Francisco office to your Seattle office?

A. Yes.

Q. Will you tell us what that is? Is that an inter-office transaction?

A. No. This is a standard purchase order form which we use in the export department for all commodities and for all purchases to any supplier and it is also used inter-office to confirm a sale. It comes in a book form, the original and a duplicate, and there is no other printed form. These [233] are the only two printed ones but the book is kept and additional copies are kept in the book later on, the signed one which is returned by the supplier. You see, this one was signed by Mr. Vanderbilt by his initials and apparently returned to us, as stated this morning, and then returned to that book and knitted in there and kept on record. In other words, we have a record of confirmed purchase orders from all suppliers in that book in chronological order.

Q. This one was confirmed by Mr. Vanderbilt?

A. Yes.

Q. Not by the Foundry?

A. No, because we did not have direct contact

(Testimony of Cyril Gregory Gips.)

with the Foundry. Our office relays it on and later on whatever they use with their supplier.

Q. So that in this case it was an interoffice transaction?

A. In this case it was an interoffice transaction.

Q. Between the Seattle office of Grace and San Francisco?

The Court: Is that 24?

Mr. Gantt: That is Exhibit—well, your Honor, it is a portion of Exhibit 19, the purchase [234] order attached to Exhibit 19.

Q. (By Mr. Gantt, continuing): And you prepared that, did you, Mr. Gips? A. Yes.

Q. That purchase order? A. Yes.

Q. Dated May 15th; now, do you know what a plant certificate is?

A. That would be a certificate by a manufacturer that he certifies that the material he has provided and he describes in that certificate is in accordance with a certain specification.

Q. Now, did you require that here from Seattle Foundry?

A. No, I didn't require it. We didn't ask for it.

Q. Now, will you examine Exhibit 20 and tell me if Mr. Vanderbilt's letter to the Foundry requires a plant certificate?

Mr. Morrow: I didn't get that question. Pardon me.

The Court: The Reporter will read the question.



(Testimony of Cyril Gregory Gips.)

(Whereupon, the following was read [235] by the Reporter: "Q. Now, will you examine Exhibit 20 and tell me if Mr. Vanderbilt's letter to the Foundry requires a plant certificate?")

A. He refers to an understanding that the Seattle Foundry will furnish a plant certificate.

Q. (By Mr. Gantt): Do you know if any plant certificates were furnished here to Grace by the Foundry?

A. I don't think they were. They were not required by us. They may have been received by our Seattle office. However, inasmuch as we didn't insist upon it, I don't really know if they ever got them or requested them.

Q. Did you have occasion to discuss with Mr. Mahoney, your immediate superior, the decision by you to accept the Seattle Foundry offer? I believe you stated you advised, both by telephone and wire and letter on May 15th—you advised Mr. Schlaugh up here in Seattle—to confirm acceptance of the Foundry offer? A. Yes.

Q. Prior to doing that, did you discuss the matter of such a confirmation or such a placing of an order with Mr. Mahoney? [236]

A. Yes, I did tell him inasmuch as I had taken the matter up previously with him. It was usual to follow through and tell him what you had done. And we had discussed it and he asked me how we got—who Seattle Foundry was and I told him we

(Testimony of Cyril Gregory Gips.)

had received a quotation from our Seattle office but that they had not been recommended to us by our usual steel relations and didn't actually know anything about them and they were not known to us and, therefore, we discussed it, that we ought to do something to protect ourselves that these not well-known manufacturers would deliver to us the goods we ordered from them.

Q. Now, Mr. Gips, your letter of May 15th, which is Exhibit 19, your letter to Grace in Seattle, Mr. Schlaugh, refers to a teletype, number 18, which is in evidence here? A. Yes.

Q. And to " \* \* \* our today's telephone conversation between your Mr. W. H. Schlaugh and our Mr. C. G. Gips \* \* \*" Do you recall that telephone conversation with Mr. Schlaugh, which apparently took place May 15th?

A. To be frank with you, I have no doubt it took place because it states it there but I would honestly not remember what it refers to; I [237] mean, what the conversation was about.

Q. Now, at the time of that telephone conversation with Mr. Schlaugh, did you have Plaintiff's Exhibit 9 in your—I guess you have it there, do you? A. Yes, I have it.

Q. Was that in your file? That is the letter from Mr. Schlaugh to you on May 8th?

A. Yes.

Q. It represents at the bottom that these are cast steel billets from sand molds?

A. That is correct.

(Testimony of Cyril Gregory Gips.)

Q. Did you have that in your file the day you talked to Mr. Schlaugh?

A. That is correct.

Q. Do you know whether you had occasion to refer to that particular letter or not?

A. I don't remember frankly.

Q. But it was there on your desk?

A. It was with the other documents; yes.

Q. Now, you testified as to certain conversations between yourself and Mr. Clark, and I believe at least one conversation with Mr. Robinson, prior to the time the trouble came, or the claim was [238] made? A. Yes.

Q. In any of those conversations, telephone or otherwise, or in any correspondence with Pittsburgh Testing Laboratory, did you have occasion to speak of or mention to Pittsburgh, either Mr. Clark or Mr. Robinson, this great price differential we have discussed, this great price differential between the Isaacson quotation and the Foundry quotation?

A. No. I had no occasion to talk to them about it.

Q. You did not discuss it with them?

A. No, I did not discuss with them the——

Q. (Interposing): Why not?

A. In trade it is a matter of principle that one does not disclose the information about price to an independent party who has nothing to do with the price. In other words, it is not good to publicize quotations of your suppliers if it is not strictly necessary to do so.

(Testimony of Cyril Gregory Gips.)

Q. Excuse me. Are you finished?

A. Yes.

Q. In connection—I am not speaking specifically of the price itself—I am speaking more specifically of the price differential. We have [239] talked about a differential between Isaacson's price and the Foundry price of approximately \$35.00—

A. (Interposing): Yes.

Q. (Continuing): —per ton, and you testified earlier today about these telephone conversations that took place between you and Mr. Clark before you sent the letter up here to Mr. Schlaugh telling him to confirm the Foundry offer; correct?

A. Excuse me.

Q. That is a very long involved sentence and I will withdraw it.

The Court: Do you withdraw it?

Mr. Gantt: Yes, your Honor, I think that was beyond pale. I will rephrase it this way.

A. Yes.

Q. (By Mr. Gantt): You have testified when you made at least one, and perhaps two, telephone calls to Mr. Clark at Pittsburgh Testing Laboratory it was prior to or on May 15th?

A. Yes; quite.

Q. And you, I believe, testified that you called him on—either on or prior—to May 15th to inquire whether Pittsburgh could do an inspection of this product? [240]

A. Yes.

Q. And I believe you testified that you mentioned that Seattle Foundry—you were considering

(Testimony of Cyril Gregory Gips.)

Seattle Foundry? A. That is correct.

Q. In that telephone conversation you did not discuss this price differential between Isaacson and Foundry? A. No.

Q. Did you discuss Isaacson Iron Works' offer at all?

A. No, we did not. It wouldn't enter the picture inasmuch as we—if we would place the business with Isaacson we would not have employed Pittsburgh Testing Laboratory. In other words, they were only concerned in the matter if at all we put the order in to Seattle Foundry; then Pittsburgh Testing automatically would have come in.

Q. Now, at the time of this first telephone conversation with Mr. Clark, which you have placed some time between the 12th or 13th of May and the 15th of May—is that correct? A. Yes.

Q. At the time of that first conversation with Mr. Clark of Pittsburgh did you have your [241] file before you on your desk? A. Yes.

Q. Were you at your own desk when you called? A. Yes.

Q. In that file you had the various letters from Mr. Schlaugh and the letters from the Washington, D. C., office? A. That is right.

Q. And your replies to those letters, or answers to those letters, copies of which you had written to both your Washington office and your Seattle office? A. Yes.

Q. And did you also have this letter of May 8th in your file? A. Yes.

(Testimony of Cyril Gregory Gips.)

Q. That is Exhibit 9? A. Yes.

Q. Which was the first reference you have had—you had had to an offer of Foundry?

Mr. Morrow: I object to this question as being repetitious. Mr. Gantt has established it has been in the file four or five different questions.

The Court: You may proceed. I think [242] it is covered.

Q. (By Mr. Gantt, continuing): In your first conversation with Mr. Clark did you have occasion to refer to that particular letter, Exhibit 9?

A. I may have, but only insofar as the specifications were concerned; not price.

Q. Well——

A. (Interposing): I mean parts of it, yes.

Q. Did you have occasion to refer to the part that says these are cast steel billets from sand molds?

A. I may have, yes, but I testified also I am not sure. I do remember having read to Mr. Clark the specifications of the original inquiry but I do not remember if I also read him this letter complete leaving out the price and the additional cost to bring it to F.A.S. value which would be of no concern to him. I do not remember, in the first place, having read him this letter or any part of it. I do not remember if I read this part as well.

Q. But you may have?

A. I may have, yes, sir; I cannot be sure.

Q. Then is it true that at the time you talked to Mr. Clark on May 15th, or in the first [243]

(Testimony of Cyril Gregory Gips.)

conversation between the 12th and 15th, that you knew that these billets were to be cast steel billets from sand molds?

A. I beg your pardon, I didn't.

Q. The file indicated it.

A. I am sorry. The only thing I knew was steel billets, according to these specifications. That is what we sold and we had ordered. I mean, I have no occasion—I mean, I am not a steel expert.

Q. I understand that, but you had read, Mr. Schlaugh's letters? A. Yes.

Q. And you testified you may have referred to that portion about these billets or cast steel from sand molds to Mr. Clark? A. Yes.

Q. You don't know whether you did or not but you may have? A. I may have.

Q. Now, didn't Mr. Clark tell you in these telephone conversations that took place before or on May 15th that ASTM specification A-17/29 required rolled or forged billets? A. No. [244]

Q. Your answer was? A. No.

Q. Didn't Mr. Clark tell you that the Foundry could not produce rolled or forged billets?

A. No, he did not.

Q. Didn't Mr. Clark tell you that the Foundry could produce only cast billets? A. No.

Q. Didn't you tell Mr. Clark that cast billets was what was ordered? A. No, I did not.

Q. Did you tell Mr. Clark that the Foundry said they were going to furnish cast billets?

A. Excuse me, could you repeat that question?

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: Will the Reporter read the question?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Did you tell Mr. Clark that the Foundry said they were going to furnish cast billets?")

A. I did not state it out of my own. If you are referring to the last paragraph of this exhibit, [245] where there is a possibility I may or may not have read to him, that is the only thing I would have mentioned to him about it.

Q. (By Mr. Gantt): O.K.; did Mr. Clark tell you that Pittsburgh Testing could inspect the billets produced by Foundry only for the chemical requirements of ASTM 17/29, for visual or surface defects, and for size?

(Whereupon, there was a brief pause.)

The Court: Excuse me, do you want the question again?

A. Well, I am bothered with one thing: Is that the complete specification you are stating now?

Q. (By Mr. Gantt): No, I am not stating the complete specification. It is about four pages long and very small type.

A. Well, the——

Q. (Interposing): The letters I have used, ASTM 17/29, is the specification referred to.

A. And the actions you described completely what is to be done according to that specification?

Q. Not necessarily; no.



(Testimony of Cyril Gregory Gips.)

A. Well, then, the answer is no. [246]

Q. In your second telephone conversation with Mr. Clark, which I believe you placed May 15th or May 16th—which was it, do you recall?

A. Well, I would not recall exactly what the second conversation was. There may have been two or three conversations in all where I called him and he may have called me back and I may have called him again between the Monday and the day we placed the business, which was Thursday, the 15th. Therefore, when you refer to the second one, I am not sure what you are referring to.

Q. Well, my understanding of your testimony this morning was——

Mr. Gantt: Perhaps the Reporter can withdraw that prior question.

The Court: The last question?

Mr. Gantt: Yes, your Honor.

The Court: It may be withdrawn.

Q. (By Mr. Gantt, continuing): In your testimony this morning you testified that you had your first conversation between Monday and Friday, which, I believe, was the 12th and the 15th?

A. Yes.

Q. With Mr. Clark? [247]                      A. Yes.

Q. And that was in the nature of a preliminary inquiry?                      A. That is right.

Q. As to whether they had an office and whether they could inspect the product?

Pardon me, did you say Monday and Friday?

A. Monday and Thursday.

(Testimony of Cyril Gregory Gips.)

Q. Monday and Thursday is more correct. Then you testified you had a subsequent telephone conversation with him at or about the time that you confirmed your offer to Seattle?

A. That is right.

Q. Your Seattle office to make a firm order with Seattle Foundry; correct? A. Yes.

Q. Now, did this subsequent call take place before you confirmed the order to Seattle Foundry?

A. Yes. Excuse me; that is the call in which we accepted the offer of Pittsburgh Laboratory to do the inspection verbally over the phone?

Q. Yes.

A. It took place before I sent my wire out to Seattle confirming that we accepted the [248] Seattle Foundry offer.

Q. And in that telephone conversation didn't Mr. Clark tell you that Pittsburgh could and would inspect only for the chemical requirements of specification A-17/29 and the visual and surface defects and for size?

A. Is that the complete specification?

Q. No, that is not the complete specification.

A. Then the answer is no.

Q. The answer is no?

A. Could you repeat the question in that case?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. And in that telephone conversation didn't Mr. Clark tell you that Pitts-

(Testimony of Cyril Gregory Gips.)

burgh could and would inspect only for the chemical requirements of specification A-17/29 and the visual and surface defects and for size?")

A. The answer is no. He didn't state that, as such.

Mr. Gantt: Thank you. [249]

Q. (By Mr. Gantt): Now, did you tell either Mr. Clark or Mr. Robinson in these conversations you have related this morning in your testimony, prior to your letters of May 20th and 21st, 1952—did you tell either Mr. Clark or Mr. Robinson whether you knew anything about steel, or steel products, or steel billets?

A. I told them that at the initial contact with Mr. Clark and I repeated that during the visit of Mr. Robinson that we—that our company was—were general merchants and were no experts on any particular commodity and that——

Q. (Interposing): Well, excuse me just a moment. My question was: Did you tell them this, and I think you can answer that yes or no.

A. Can you repeat the question?

Mr. Gantt: Will the Reporter read the question?

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter: "Q. Now, did you tell either Mr. Clark or Mr. Robinson in these conversations you have [250] related this morning in your testimony, prior to your letters of May 20th

(Testimony of Cyril Gregory Gips.)

and 21st, 1952—did you tell either Mr. Clark or Mr. Robinson whether you knew anything about steel, or steel products, or steel billets?”)

A. (Continuing): No, I did not tell them that I knew anything about steel, if that answers the question.

Q. (By Mr. Gantt): Yes; now, did you tell either Mr. Clark or Mr. Robinson in these conversations that took place prior to May 20th, or your letter of May 20, 1952, that you wanted Pittsburgh Testing Laboratory to accept the billets on behalf of Grace and Company?

A. Accept? No. I told them inspect and certify as to quality.

Q. I see.

A. On behalf of Grace and Company.

Mr. Gantt: Your Honor, have any of these depositions been published?

The Court: I don't believe so. I don't recall whether we did in pretrial or not.

Mr. Morrow: There is no objection.

Mr. Gantt: Well, I don't think anybody [251] has. They are here in the files.

The Court: You may, if you wish.

Mr. Gantt: I would like this one of Mr. Gips published.

Q. (By Mr. Gantt): In that connection, Mr. Gips, at your deposition in San Francisco on August 13, 1954, were you asked the following questions?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: May I have the page, please?

Mr. Gantt: At page thirteen.

Q. (By Mr. Gantt, continuing): "Whom did you contact at Pittsburgh Testing Laboratory?"

Were you asked that question? A. Yes.

Q. And did you answer:

"The initial contact was on the 'phone, which, I believe, the conversation on the part of Pittsburgh was by Mr. Clark. However, it was to introduce the subject and afterwards Mr. Robinson visited Grace and Company's office to become acquainted with us and at which time I requested him to advise me if his company was able and willing to take upon themselves to inspect the material which we were ordering [252] from the Seattle Foundry."

Was that your answer?

A. That is right.

Q. Now, I believe you testified, with regards to a discussion you had with Mr. Clark at Pittsburgh in San Francisco on May 20th—a telephone conversation?

A. Yes?

Q. I believe that you stated that the information you received in that telephone conversation on May 20th was related—was relayed on to Mr. Schlaugh in Washington on May 22nd, which is Plaintiff's Exhibit 25. I wonder if you have any independent recollection of what was said in your telephone conversation of May 20th with Mr. Clark of Pittsburgh?

A. I called him for the purpose of obtaining his

(Testimony of Cyril Gregory Gips.)

answer to the questions posed me by our Seattle office's letter and a copy of the Foundry letter which was attached, and I told them that apparently neither the Foundry nor Pittsburgh Testing Laboratory had any specification available the way it was ordered and I asked him about it and he said he would furnish that specification to his office and the matter of the technical inquiries in the letter from [253] the Foundry—I think he did not give me the answer right there. He called me back on it to give me the answers to that, the point being that they had to look it up.

Q. And was this telephone call on May 20th?

A. It may have been on the 21st; that I am not sure about, but it was upon receipt of the letter which was on the 20th.

Q. Prior to your letter of May 20th, which is Exhibit 21 in this case, your contact with Pittsburgh consisted primarily of your telephone conversations to Mr. Clark, hadn't they?

A. That is correct.

Q. And I believe your testimony is the only time you talked to Mr. Robinson is when he came to your office?

A. Yes; he came to meet us face to face.

Q. And that was sort of a social call, was it?

A. Well, social call—he liked to meet the people he was doing business with and we appreciated that in return and we just discussed the business in general. We didn't go into details of rates or charges or what not. I remember specifically showing him

(Testimony of Cyril Gregory Gips.)

the inquiry letter from our Washington office, original inquiry letter, and then we didn't go [254] into particular details. I do remember taking him in one moment to see Mr. Mahoney, vice president in charge, and just meeting him and he expressed himself at that time that he was glad to do business with us and we were glad to do business with him.

Q. But your letter of May 20th, which is Exhibit 21, states:

“\* \* \* confirms a conversation between your Mr. Parker M. Robinson and our Mr. Gips.”

A. Yes, that is correct.

Q. Did you keep any notes of your telephone conversations; any sort of a journal or notebook?

A. I generally do.

Q. Did you keep it at this time?

A. I did keep such a book, yes.

Q. Where is it?

A. That, unfortunately, I do not know. At the time that the first claim was filed it was then a year later and I could not find the book.

Q. So that your reference to these telephone conversations might be off one or more days?

A. Well, there are some notes on some of the letters which were in my file at that time. This morning I read one of them. I think the letter you were just referring to, which was on a matter [255] of chipping.

Q. Yes?

A. There was one of the notes I wrote on there, but that is not complete. We use a book. Each year

(Testimony of Cyril Gregory Gips.)

we get a new one from the company and we note in there people that visit you, or prices quoted over the 'phone, appointments in the future, and so on.

Q. I understand; you don't have that now?

A. I don't have that book.

Q. Now, with regard to Exhibit 34, which is a letter that you wrote to the Seattle office of Grace, dated July 22nd, the first part, you have testified, concerns the high manganese content in one of the heats of the Foundry—eight billets? A. Yes.

Q. And you stated that you told Mr. Schlaugh you would accept the billets anyway but you wouldn't allow any exceptions in the future?

A. Yes.

Q. There is a statement in the second paragraph of your letter to the effect that:

“That specification is absolutely normal and should give no difficulties whatsoever to any Foundry.” A. Yes? [256]

Q. Now, did you write that?

A. I wrote the letter, yes.

Q. Is that your information?

A. No, that is the—I would hardly know that, having no steel knowledge but that was told me by Mr. Clark.

Q. That again came from Mr. Clark?

A. Yes.

Q. Have you ever looked up the word “foundry” in a dictionary?

A. Frankly, no, I haven't.

Q. Now, did you in your San Francisco office,



(Testimony of Cyril Gregory Gips.)

and particularly you, Mr. Gips, receive reports from Pittsburgh Testing Laboratory?

A. Yes, we did.

Q. And did you receive those periodically?

A. Yes.

Q. And I want to hand you what has been marked——

Mr. Gantt: And this is admitted?

Mr. Morrow: Yes, that is in evidence.

Q. (By Mr. Gantt, continuing): ——in evidence as Exhibit 35. Will you state what those are?

A. Those are the certificates of the [257] Pittsburgh Testing Laboratory on the work that was being done against our order.

Q. And did they come to you? A. Yes.

Q. And were they again put in your file——

A. (Interposing): Yes.

Q. (Continuing): ——on this whole matter? Did you read them as they came?

A. I read some of them. I didn't always read all of them, but it doesn't make much sense to me.

Q. Do you know that these reports make frequent reference to "casting" and "pouring" and "cast billets"?

A. I have seen mention of them in there; yes.

Q. Did you know that at the time?

A. I read it so that I must have.

Q. It must have come to your attention?

A. I must have read it; yes.

Q. Who else in Grace and Company got copies of this, if you know? Did your Seattle office?

(Testimony of Cyril Gregory Gips.)

A. If I remember well, I received them direct. It may have gone through our Seattle office but I don't think so. I think they were sent direct. [258]

Q. I don't see any receiving stamps on these. Your usual receiving stamp doesn't appear on these.

A. Then it may have been accompanied by a letter, or they may have been attached to the bills when the bills came in, but I think I received them separate.

Q. There is an indication on the last page of each report at the bottom of the page, "cc," which I take it stands for carbon copy, and the numeral "2," "W. R. Grace and Company," so that apparently two came to Grace and Company?

A. It is quite possible.

Q. You received both of them?

A. I would eventually unless it went through our Seattle office and they kept on, but it is unlikely. They would have sent both through.

Q. Upon receipt of any of these from Pittsburgh did you have occasion to discuss the contents of any of these with Mr. Clark or Mr. Robinson or anyone else of Pittsburgh? By "these," I am referring to the reports which are marked Exhibit 35.

A. I may have on this manganese content, or something like that, but I don't see that I have.

Q. You have no independent recollection [259] of it? A. No.

(Whereupon, there was a brief pause.)

(Testimony of Cyril Gregory Gips.)

Mr. Gantt: Excuse me just one moment, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): You have testified this afternoon and this morning of Mr. Robinson dropping in to see you at Grace and Company?

A. Yes.

Q. I believe you testified that was some time after the 15th and prior to the 20th?

A. I would put it that date; yes.

Q. Some time between the 15th——

A. (Interposing): Some time between the 15th and the 20th.

Q. And I believe you also testified you took him in to see Mr. Mahoney? A. Yes.

Q. Now, was anyone else present when Mr. Robinson came to visit you at Grace?

A. Well, we work in a big hall. There were many people present but he didn't talk with anyone else to my knowledge but to myself. [260]

Q. He came up and introduced himself?

A. Yes.

Q. And then you, yourself, took him in to meet Mr. Mahoney? A. Yes.

Q. And Mr. Mahoney was alone? A. Yes.

Q. So that the only two people he would have talked to are Mr. Mahoney and yourself?

A. Yes.

Q. So that the only two people that would have known he was there would be Mr. Mahoney and

(Testimony of Cyril Gregory Gips.)

yourself, is that correct?      A. Yes.

Q. I believe you said yesterday you didn't know the difference between a billet and an ingot?

A. That is correct.

Q. Do you know the difference now?

A. Quite frankly I wouldn't dare to give a description of it. I still don't, no.

Q. In the journal that you said you kept on your desk of notes as they occurred through the day and other occurrences, would you have had a reference to Mr. Robinson's visit to you that you have testified to? [261]

A. I don't really think I would, not to his visit, unless he gave some specific details. If he quoted me a rate or something I couldn't possibly remember. If it is merely a visit to meet somebody you leave your card and say "hello" and introduce yourself.

Q. But you don't jot that down?

A. You don't jot it down. If not something of importance I don't note those things down, no.

Mr. Gantt: That is all, your Honor.

However, I would like to state I understand Mr. Savage has requested that all witnesses be present until the second phase of the case.

The Court: Have you any questions, Mr.—

Mr. Savage (Interposing): Savage. If the Court please, the third party defendant, Seattle Foundry, waives any cross-examination of Mr. Gips insofar as the cause between Grace and Pittsburgh is concerned.

(Testimony of Cyril Gregory Gips.)

The Court: Do you have any redirect?

Mr. Morrow: Just very short.

The Court: All right.

Mr. Morrow: I would like this marked as a Plaintiff's exhibit. [262]

The Clerk: Plaintiff's Exhibit 68 marked.

(Plaintiff's Exhibit 68 marked.)

Mr. Morrow: I offer 68 in evidence as part of the records of Grace and Company.

Mr. Gantt: May we see it?

Mr. Savage: We have no objection.

Mr. Gantt: I just want to take a look at it.

(Whereupon, there was a brief pause.)

No objection, your Honor.

The Court: Exhibit 68 may be admitted.

(Plaintiff's Exhibit 68 admitted.)

The Court: Anything further, Mr. Morrow?

Mr. Morrow: Yes.

### Redirect Examination

By Mr. Morrow:

Q. I would like to ask you, Mr. Gips, if this Plaintiff's Exhibit 28 is the letter you referred to as having been sent out to your Washington office on May 9, 1952, advising the Washington office that there might be a change in supplier. You may wait [263] just a moment to take a look at the letter.

(Whereupon, there was a brief pause.)

(Testimony of Cyril Gregory Gips.)

A. Excuse me. Yes, Mr. Morrow, that is the letter I was referring to.

Q. Referring you to Plaintiff's Exhibit 35, which is designated Reports of Pittsburgh Testing Laboratory, Mr. Gips, you testified that they came over your desk and you read some of them and also you indicated that they may be considered as a certificate of Pittsburgh Testing Laboratory in the trading business, export and import business. What use is made of a certificate of inspection?

A. There are various uses and various reasons why they are requested. One reason may be the way W. Grace and Company employed it, to insure that they were receiving the exact product that they had purchased and to have a responsible party stand in for it and certify that that is so. For consular purposes, some countries demand this.

Q. I think you have answered my question. What was the purpose of your providing that Pittsburgh make an inspection and make an inspection certificate, I think it is——

May I have 21, please?

(Whereupon, document was handed to [264] Counsel by the Clerk.)

——and deliver—I refer you to Exhibit 21, your letter to Pittsburgh of May 20th, Mr. Gips. It is 1952. You indicate there that you have requested them to make an inspection—to make inspection and deliver certificate of inspection for the following material.

(Testimony of Cyril Gregory Gips.)

What was the purpose of requiring a certificate of inspection?

A. So that—we had to do here with a supplier that we didn't know and we had to have a certificate. We were making delivery to a foreign government and we had to insure that we were getting the right merchandise and, therefore, we employed the Pittsburgh Testing Laboratory, who stated they were experts in this type of inspection, and making them responsible that this was the right material.

Q. Well, will you please state whether or not the purpose of the inspection certificate was to be used in any manner by Grace and Company in the event of any future claim with respect to the goods?

A. It was made for that sole purpose. Our client didn't demand it. It was for the protection of Grace itself that we demanded that there be a responsible expert present who guarantees the right [265] merchandise to be delivered.

Mr. Gantt: I object to the answer as not responsive, your Honor.

Mr. Morrow: I am willing to have that part stricken which is not, your Honor.

The Court: Do you wish the unresponsive part of that stricken?

Mr. Gantt: Yes, your Honor.

Q. (By Mr. Morrow): Mr. Gips, in your business of exporting and importing does the customer demand a certificate of inspection on occasions?

A. On occasions he will.

Q. Is that one of the purposes in this case for

(Testimony of Cyril Gregory Gips.)

requesting a certificate of inspection, in the event such was required by the customer in New Zealand?

A. No, it was not requested and it was solely done for the purpose of the protection of W. Grace and Company, that they would receive merchandise in compliance with the order that the foreign government had placed in their care.

Q. Well, what I want to get at—does the certificate—first of all, generally, is it obtained by an exporter and importer against the contingency [266] that later on the customer may require a certificate of inspection?

A. Well, it may be used for that—for that purpose. In other words, to disclaim responsibility; but the point is, if the client has not stated that such a certificate shall be final, or regarded as final, then it can not be used. In this case if the New Zealand Government had come in and said, “You will also furnish us with a certificate of inspection by the Pittsburgh Testing Laboratory and that that shall be final,” in other words, that constitutes that once tested by Pittsburgh we wouldn’t have any more responsibility, then at that moment the responsibility goes back to the inspector.

Q. Now, assume in this case that the material sold by Grace and Company to the New Zealand Government Trade Commissioner had complied with the New Zealand Government Trade Commissioner’s order, what purpose would the certificate then serve in the event that the New Zealand Gov-



(Testimony of Cyril Gregory Gips.)

ernment Trade Commissioner made a claim which was, say, unfounded?

Mr. Gantt: I will object to that, your Honor.

The Court: I don't think it is material. [267]

I have a pretrial hearing starting at 4:30. I want to inquire——

Mr. Morrow (Interposing): That is my last question.

Mr. Gantt: I have no further questions at this time.

The Court: That concludes it. Now, Mr. Gips, do you want to be excused for the next day or two?

Mr. Morrow: Well, I would rather leave it this way: That he may be excused and we will guarantee that he be reproduced in the event he is required.

The Court: Is that satisfactory?

Mr. Savage: Yes.

The Court: All right. Then that is all.

Mr. Gantt: Well, just one point there. You say you will guarantee he will be back?

Mr. Morrow: For Mr. Savage, if he wants him. Do you want him?

Mr. Gantt: It is possible.

Mr. Morrow: If either party wants, you will come back, Mr. Gips?

The Witness: Yes.

The Court: If he is excused then it is [268] by agreement among yourselves?

Mr. Gantt: And he will be available on what kind of notice?

(Testimony of Cyril Gregory Gips.)

Mr. Morrow: Well, reasonable. He can fly up in a day.

The Court: Well then, you be available to appear within twenty-four hours' notice.

The Witness: Within twenty-four hours' notice.

Mr. Gantt: I think that is satisfactory.

The Court: This case is recessed until tomorrow morning at 10 o'clock.

How do you anticipate your time is running?

Mr. Morrow: I feel I am fairly on schedule. We didn't get started until noon.

The Court: I understand that. How much more time?

Mr. Morrow: I think under the circumstances we should finish tomorrow.

The Court: And you will be prepared to go ahead tomorrow, Mr. Gantt?

Mr. Gantt: Will I be?

The Court: If we get to you, will you be prepared to go ahead? [269]

Mr. Gantt: Yes, your Honor.

(Witness excused.)

(Whereupon, at 4:35 o'clock p.m., November 30, 1955, a recess was had in the within-entitled and numbered cause until 10 o'clock a.m., December 1, 1955.) [270]

WILLIAM H. SCHLAUGH

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: William H. Schlaugh, S-c-h-l-a-u-g-h (spelling). [275]

\* \* \*

Direct Examination

By Mr. Morrow:

Q. Mr. Schlaugh, have you been sworn?

A. Yes, I have.

Q. Will you please state your full name?

A. William Herman Schlaugh.

Q. And what is your home address?

A. 209 Northwest 23rd Avenue, Portland.

Q. And what is your business address in Portland? A. 614 Board of Trade Building.

Q. By whom are you employed? [277]

A. Grace and Company, Pacific Coast.

Q. What is your present position with the Grace and Company?

A. Manager of the lumber division of the Northwest.

Q. What are your duties as manager of the lumber division?

A. Procuring and purchasing lumber for the account of Grace and Company.

(Testimony of William H. Schlaugh.)

Q. And what is the nature of the business of Grace and Company?

A. Of the lumber?

Q. Yes.

A. We export lumber from the Pacific Coast to foreign countries, Peru and Australia, South Africa, Panama, and other countries, and we also ship lumber by water and rail to the Atlantic Coast seaboard.

Q. What roll to you play in that business?

A. I purchase all of the lumber which is shipped for our account to these various destinations.

Q. What was your job in 1952?

A. In 1952 I was in the export-import department of Grace and Company, Seattle. [278]

Q. And what was your residence at that time?

A. 2511 East 135th Avenue, Seattle.

Q. And when did you move to Portland?

A. September 1, 1955.

Q. What were the duties of your occupation in April through September, 1952?

A. My duties were handling the various inquiries which we received from our San Francisco office. In other words, our San Francisco office was selling the various products and we were acting as buying agent for them and my job was procuring-locating supplies and we got the business in actually purchasing the different commodities which we exported.

Q. When did you start to work for the Grace Company?      A. January, 1948.

(Testimony of William H. Schlaugh.)

Q. And in what capacity?

A. In the billing department, freight traffic department.

Q. How long were you so employed?

A. Until—in that position?

Q. Yes. A. Until October, 1948. [279]

Q. And then what position did you take?

A. Then I was taken in commerce as a trainee in the export-import department.

Q. Who was the manager of the Seattle office during your employment in Seattle?

A. From January, 1948, until February 1, 1955, Mr. W. D. Vanderbilt was northwest manager for Grace.

Q. Mr. Vanderbilt then retired, did he?

A. That is correct.

Q. When did you enter the export and import department of the company?

A. In October of 1948.

Q. Had you any previous experience prior to that time in exporting and importing?

A. No.

Q. Or the purchase or sale of commodities?

A. No.

Q. Just what was your experience in exporting and importing while you were with Grace and Company? A. During what period?

Q. During the period from 1948 until the spring of 1952?

A. Well, we—do you want to know the [280] different commodities that I handled?

(Testimony of William H. Schlaugh.)

Q. Yes; just what you did.

A. Well, as an example our San Francisco office would forward us inquiries by letter or by teletype asking us to offer on—lumber was the main item which I handled up here but in addition to lumber there would be wheat and flour and sometimes pulp and canned salmon, oats, and then many miscellaneous items which you may only see once.

Q. Following receipt of the inquiries from San Francisco what were your duties?

A. My duties were to locate a possible supplier or suppliers for that commodity at the lowest possible price and then ship them on to San Francisco.

Q. Did you deal in any steel products prior to May or April, 1952?      A. No, I did not.

Q. I mean you personally?      A. No.

Q. Had you any experience in the manufacture, yourself personally, of course, of steel or steel products prior to April, 1952?      A. No.

Q. Had you any technical knowledge of [281] either the sale or manufacture of steel products prior to that time?      A. No.

Q. Had you any experience or knowledge concerning the requirements of specifications going to make up products of steel?      A. No.

Q. Were you in April and May familiar with the American Society for Testing Materials standards?

A. I will answer that yes and qualify it by saying on lumber only.

Q. On lumber only?

(Testimony of William H. Schlaugh.)

A. In that we had purchased in the past poles and pilings under certain ASTM specifications.

Q. Had you any knowledge or information concerning the requirements, specifically of the ASTM A-17/29 specifications for steel forgings and billets and slabs?      A. No.

Q. Referring you to Plaintiff's Exhibit 2, Mr. Schlaugh, I will ask you if you received this, if this exhibit came to your attention?

A. Yes, it did.

Q. In the Seattle office; and when did it [282] come to your attention?

A. On April 21, 1952.

Q. And what did you do in connection with that?

A. I wrote letters to various possible suppliers which are listed on this paper.

Q. And can you just run them off?

A. Western Steel, Pacific Car and Foundry, N and S, Seattle Foundry, Seidelhuber, and Isaacson.

Q. How did you——

The Court (Interposing): Are those—excuse me, are those listed on here?

The Witness: In my pencil marks.

Q. (By Mr. Morrow, continuing): How did you determine to whom you would send out inquiries to supply this material?

A. In this exhibit San Francisco stated that according to their information the firms of Isaacson and/or Seidelhuber might be in a position to offer so that I obtained those two firm's names from the San Francisco letter, and then I went to

(Testimony of William H. Schlaugh.)

the classified section in the 'phone book under foundries and found the other names there. [283]

Q. Now, referring you to Plaintiff's Exhibit 3, would you indicate whether those are inquiries which you sent out pursuant to the San Francisco request for quotations on steel billets?

A. Yes, they are.

Q. And in particular with reference to Isaacson and Seattle Foundry, are those ones which you sent out? A. Yes.

Q. Now, it is indicated that there was an attachment of specifications to those inquiries. Do you recall whether there was such an attachment to each of the inquiries? A. Yes, there was.

Mr. Morrow: Exhibit 4?

(Whereupon, document was handed to Counsel by the Clerk.)

Q. (By Mr. Morrow): Now, referring you to the Exhibit 4, Mr. Schlaugh, which is a letter admitted in evidence of May 1, 1952, which indicates an additional copy of your inquiry covering steel billets for Central America. It was enclosed to Seattle Foundry. I will ask you to take a look at the enclosure and indicate whether or not those are the specifications [284] that were sent with the original letter of inquiry to Seattle Foundry?

A. Yes, they were.

Q. This enclosure attachment to Plaintiff's Exhibit 4 indicates that it is on a mimeographed copy;



(Testimony of William H. Schlaugh.)

is that correct?           A. Ditto, yes.

Q. Had you made up a number of specifications of similar type?           A. Yes.

Q. And can you say whether or not the enclosures with your letters of inquiry to Isaacson and to Seattle Foundry were identical with the attachment to Plaintiff's Exhibit 4?

A. They were identical.

Q. Now, referring you to Plaintiff's Exhibit 5, which has been admitted in evidence, and which transmits information to San Francisco, I will ask you if that is your signature?

A. Yes, it is.

Q. It is indicated therein, Mr. Schlaugh, that you made reference to an Isaacson quotation, to a Seidelhuber quotation, and to a Seattle Foundry working on the order. Do you recall how you got the information from Isaacson in this [285] instance?

A. I obtained the information from Isaacson from a telephone conversation.

Q. And in connection with Seidelhuber, do you recall off hand how you received that information?

A. I received that in a telephone conversation.

Q. And in connection with Seattle Foundry?

A. That also.

Q. And referring you to Plaintiff's Exhibit 6, which is a formal proposal, or, rather a written proposal, addmitted in evidence, from the Isaacson Iron Works, did that come to your attention?

A. Yes, it did.

Q. Can you state whether or not the Isaacson written proposal conformed to the previous infor-

(Testimony of William H. Schlaugh.)

mation you had received by telephone in connection with the Isaacson quotation? A. Yes, it did.

Q. And referring you to Plaintiff's Exhibit 7, which has been admitted in evidence, it appears to be an offer of the Seattle Foundry Company. Will you state whether that came to your attention?

A. Yes, it did. [286]

Q. And in connection with that offer, Mr. Schlaugh, did you advise your San Francisco office concerning the Seattle Foundry Company's offer?

A. Yes.

Q. And is that information conveyed to San Francisco contained in Plaintiff's Exhibit 9?

A. Yes.

Q. Is that your signature on Plaintiff's Exhibit 9? A. Yes.

Q. Referring you to Plaintiff's Exhibit 10, Mr. Schlaugh, which is an exhibit admitted in evidence, appearing to have been written on May 9, 1952, by Mr. Gips of your San Francisco office to the Seattle office and received in the Seattle office May 12, 1952, can you state whether or not that letter came to your attention? A. Yes, it did.

Q. What did you do in connection with that letter, if anything?

A. I telephoned Seattle Foundry, Mr. Jim Murphy, and asked him to make sure that his quotation was correct. That is, the specification, whether he was quoting ASTM specification 17/29 and that the prices he quoted me were correct. [287]

Q. Did you keep any record of telephone con-

(Testimony of William H. Schlaugh.)

versations—— A. (Interposing): Yes.

Q. (Continuing): in your office?

Referring you to your export journal, and page 58, the export journal having been admitted in evidence, can you by reference thereto confirm the fact, or can you not, either way, that you talked to Mr. Murphy on about May 12, 1952?

The Court: What is that exhibit number?

Mr. Morrow: I am sorry. That is——

The Clerk (Interposing): 55.

Mr. Morrow: 55, no, that is 56.

The Witness: 54.

Mr. Morrow: 54.

The Court: It is marked export journal in the pretrial order.

Mr. Morrow: Yes, that is quite correct. Exhibit 55 is the——

The Witness (Interposing): It shows 54 here, Mr. Morrow.

Mr. Morrow: 54?

The Witness: Yes.

The Court: On the pretrial order it is 54. I just wanted to get the number. [288]

Mr. Morrow: We got this straightened out.

The Court: The Reporter will read the question.

Mr. Morrow: I will repeat it.

The Court: Will you rephrase it?

Mr. Morrow: Yes.

Q. (By Mr. Morrow, continuing): With reference to your journal, Plaintiff's Exhibit 54, can you

(Testimony of William H. Schlaugh.)

establish when you talked to Mr. Murphy in connection with Plaintiff's Exhibit 27?

A. Yes. My journal showed that I had a telephone conversation with Mr. Murphy on May 12th.

Q. Does the journal indicate that—to what the conversation was in reference to?

A. Well, it was in reference to the steel billet inquiry.

Q. What page is that on? A. Page 58.

Q. Would you just read what your notes are in reference to that particular matter?

A. I have down here:

“Seattle Foundry, Jim Murphy, item two, [289] \$130.00 per two thousand pounds f.o.b plant.”

Then there is the word “Truck.” Then the next line is:

“Thought was chrome nickel steel.”

The Court: Read that again.

The Witness: “Thought was chrome nickel steel Is low carbon steel.”

Q. (By Mr. Morrow): Now, is that all?

A. There is some more which had to do with this conversation.

Q. Yes; well, go right ahead.

A. “Type A.” Do you want me to read on?

Q. Yes.

A. “Type A—Manganese .50/.80; phos. .04 max.; sulphur .05 max.; carbon” and then “type” with a line crossed over it and “Grade 2 .15/.25 item 2 carbon .05/.15.”

(Testimony of William H. Schlaugh.)

And then I have written down one more further thing on the page:

“Jim Murphy,” and under that I have, “\$3.00 per ton to load on a car.”

Q. Is that all of your entries in connection with that?

A. “Shunting car,” and something else there. That is all. [290]

Q. Mr. Schlaugh, you said that you indicated that you called Mr. Murphy. Now, in particular reference to Plaintiff’s Exhibit 10, that is a letter of May 12th from your San Francisco office, what did you do or what was the subject of your conversation between yourself and Mr. Murphy on that occasion?

A. As I said previously, I immediately telephoned him because of San Francisco’s letter. That would be the only reason I would telephone him.

Q. What did Mr. Murphy—what was his answer or reply?

A. He gave me assurance that the order he was quoting was on steel billets per ASTM specification so-and-so, and he also went over his prices to make sure that his prices quoted were correct.

Q. Now, do you recall whether or not you made any reply to your San Francisco office?

A. Yes, on the letter received there is a place for us to—we state whether we answered it or not and if it is by letter we just put the date and if it is by teletype we write down teletype and the date

(Testimony of William H. Schlaugh.)

and I have shown on this letter that I answered it by teletype on May 12th. [291]

Q. Referring you to Plaintiff's Exhibit 13 can you state what that is in reference to your request by the San Francisco office?

A. Well, this is a teletype which the Seattle office sent to the San Francisco office on May 12th.

Q. Yes; can you state whether or not there is any reference in your teletype, or can you state how the letter—that is Plaintiff's Exhibit 10?

A. 10.

Q. —10 is connected up with Plaintiff's Exhibit—this teletype——

A. 13.

Q. —13?

A. Plaintiff's Exhibit 10 is a letter from San Francisco and has a number, letter number, 9586. In my teletype, on our teletype, to San Francisco I referred to that letter 9586.

Q. Now, did you personally send out this teletype?

A. Yes, I did.

Mr. Morrow: I would like to have the Court read the——

The Court (Interposing): Have I seen that once?

Mr. Morrow: I think so. [292]

A. (Continuing): I think I should add this: You asked me if I personally sent it out. I did. Before——

Q. (By Mr. Morrow, interposing): Yes?

A. (Continuing): sending it out I was still working under Mr. Vanderbilt and I showed him a

(Testimony of William H. Schlaugh.)

rough copy of the teletype first and he approved it.

Q. Was this teletype, May 12th, 12:02 p.m., sent out prior to or after your conversation with Mr. Murphy? A. After.

Q. How long after?

A. I would say immediately or when the next teletype message was scheduled for San Francisco.

Q. Now, referring you to Plaintiff's Exhibit 12, which has been admitted in evidence, asking for an explanation of substantial differences in price, did that come to your attention? A. Yes.

Q. And was there a reply to that?

A. This message came in on the exact same wire at the same time which we had sent our reply.

Q. Referring to Plaintiff's Exhibit 13?

A. That is correct. They are referring to [293] their 9586, which is Plaintiff's Exhibit 10. Since we had told them, in Plaintiff's Exhibit 13, that the quotation 3234 was in order we did not make any additional reply.

Q. Now, can you state whether or not—or when you had—if so, when you had—any information from your San Francisco office in connection with the placing of the business with Seattle Foundry?

I will refer you to the lumber journal in order that you might refresh your recollection.

The Court: Do you have the question in mind?

The Witness: Yes.

A. That is when I first knew that Grace had received the order?

Q. (By Mr. Morrow): Yes, to place the order

(Testimony of William H. Schlaugh.)

—information to place the order. Had you received prior information that Grace was about to receive the order from the New Zealand Government Trade Commissioner?

The Court: I think you better strike those two questions and rephrase it. It is kind of vague.

Mr. Morrow: All right. We will start all over again. [294]

Q. (By Mr. Morrow, continuing): First of all, I will refer you to transactions on the 9th, including a number of exchanges of telegraphs between your different offices, being Plaintiff's Exhibit 66, and I will ask you if you can state what the circumstances of this case were on May 9th? Did you specifically——

The Court (Interposing): Circumstances of the order?

Mr. Morrow: Pardon?

The Court: “\* \* \* circumstances of this case.”

Q. (By Mr. Morrow, continuing): Well, particularly, did you receive any advice on May 9th in respect to the possibility of Grace receiving the order from the New Zealand Government Trade Commissioner?

A. No, there is nothing in these.

Q. Not in there? A. No.

Q. Now, in reference now to the information which you—any information you had from your San Francisco office in connection with the possibility of placing this offer, what did you have?

A. There are other teletypes. These aren't the ones. [295]



(Testimony of William H. Schlaugh.)

Q. I see.

A. I received another teletype. I believe it was requesting that I extend my offers from Seattle Foundry and Isaacson and in that teletype they said, “\* \* \* except place the order soonest \* \* \*,” but that teletype is not listed here.

Q. Isn't it in that group there?

A. I don't see it. These aren't asking for extensions on the offer.

The Court: Your first question was on May 9th, what knowledge he had about Grace placing or Grace receiving the order from New Zealand; is that correct, Mr. Morrow?

Mr. Morrow: That is correct. We are just backing up here a little bit.

Q. (By Mr. Morrow): Here is—well, I think I was right in the first place. If you will, refer to this export journal now and your entry there on page 58—not 58, page 61 of your export journal.

The Court: Export or lumber?

Mr. Morrow: It is the export journal. I am sorry I am so confusing to the Court and to the witness, your Honor, but I think I can get at this. [296]

Q. (By Mr. Morrow, continuing): Now, will you just disregard what I just told you?

A. Yes.

Q. Now, I will refer you to Plaintiff's Exhibit 15 and the wire there in connection with the steel billets. Did that wire—where did that wire originate?

A. From our San Francisco office.

Q. Did it come to your attention?

(Testimony of William H. Schlaugh.)

A. Yes, it did.

Q. Would you read the wire now so that I can have it in mind?

A. "Steel billets. Wire number 4. Confirm Seattle Foundry and Isaacson Iron Works. Extend validity offers. Reference your letters 3234 and 3208. This reply to your 16th, 5:00 p.m. Probably will place order soonest."

Q. Now, did you—or do you recall whether or not at about the same time you had a telephone conversation with Mr. Gips? I will refer you to page 61 of the export journal?

A. Yes. That telephone conversation is listed on page 61 of the export journal. That was my first telephone conversation I had had with Mr. [296-A] Gips on this transaction.

Q. Now, in connection with that entry, would you just read it, please?

A. "Steel billets." I had the name Gibbs but his name is Gips. "Mr. Gibbs, confirm acceptance Inspection—Pittsburgh Testing Laboratories. We sell F.A.S., Seattle 45/90 days, rating and license."

The word "indecent" is written in there.

Then down below:

"No excise tax."

Q. In reference to your telephone conversation with Mr. Gips and your teletype requesting you to confirm the acceptance of the Foundry, what did you do?

A. I immediately telephoned Seattle Foundry

(Testimony of William H. Schlaugh.)

and talked to Jim Murphy and placed the business with him.

Q. And did you advise your San Francisco office?

A. Yes; we confirmed that we had done so.

Q. And referring you to Plaintiff's Exhibit 18—yes—is that the confirmation wire?

A. It is.

Q. Sent out by you? A. Yes. [296-B]

Q. Now, during this period of time did Mr. Vanderbilt have anything to do with the placing of the contract with the Seattle Foundry?

A. No, he had no contact at that time—had had no contact with Seattle Foundry.

Q. Did he subsequently have something to do with the contract?

A. With the contract itself?

Q. Yes.

A. He signed the contract.

Q. He signed the contract? A. Yes.

Mr. Gantt: Objection, your Honor, if I may be permitted to object here, to the calling of this document, the exhibit here, a contract.

The Witness: No, it isn't.

Mr. Gantt: I think that was in his question. His question was: Did Mr. Vanderbilt sign the contract? I think it was in both the question and answer and I object to the question and move that the answer be stricken.

The Court: The Reporter will read the question and answer.

(Testimony of William H. Schlaugh.)

Mr. Morrow: I am perfectly willing that it be understood that—at this time that— [296-C] Plaintiff's Exhibit 20 and that anything the witness has said should not be construed as to an interpretation of the nature of the document, which is the sole purpose of the Court.

Mr. Gantt: I believe that the record should be changed there to show——

Mr. Morrow (Interposing): Very well.

Mr. Gant (Continuing): that it is Exhibit 20.

Mr. Morrow: I am willing that the questions and answers be stricken, your Honor.

The Court: It will be so ordered.

Q. (By Mr. Morrow): Showing you Plaintiff's Exhibit 20, Mr. Schlaugh, I will ask you if that is Mr. Vanderbilt's signature? A. Yes, it is.

Q. Who prepared that document?

A. I am not sure who prepared it. Mr. Vanderbilt's initials are shown below and it would appear that he prepared it; and, if I prepared it for his signature, ordinarily my initials would show below. I have the feeling I prepared it and showed it to him and he checked it over to see if it was in accordance with his also. [296-D]

Q. Now, are you familiar with Exhibit 20?

A. Yes.

Q. And is the subject matter of your discussions with Mr. Murphy in reference to the Foundry selling Grace and Company steel billets contained in that document, Exhibit 20? A. Yes.

Mr. Gantt: Objection, your Honor.

(Testimony of William H. Schlaugh.)

The Court: Objection sustained.

Mr. Gantt: And move that the answer be stricken, if he did answer.

The Court: The answer given was "yes" and it will be stricken.

Q. (By Mr. Morrow): Well, does the—does that instrument cover the subject matter of your offers received from the Foundry and your conversations with Mr. Murphy?

Mr. Gantt: Objection.

A. Yes.

Mr. Gantt: Objection, your Honor.

The Court: Objection sustained. I don't believe you can amplify that document in that fashion, Mr. Morrow.

Mr. Morrow: Very well. [296-E]

The Court: There is one question I wish to get straightened out here that may or may not have been covered by the order to strike. The question here to this witness, and I don't believe it was stricken, in substance was this:

Did Mr. Vanderbilt have anything to do with this transaction up to this time?

Does Counsel recall that question?

Mr. Morrow: Yes.

The Court: I believe the answer was, in effect, "no."

Mr. Morrow: The question was in reference to the contract and not in reference to any——

The Court (Interposing): Should we strike that question?

(Testimony of William H. Schlaugh.)

Mr. Morrow: It is agreeable that the question and answer be stricken.

Mr. Gantt: Fine.

The Court: And then if you wish to establish anything further——

Mr. Morrow (Interposing): I said I would start all over again, which I did.

Q. (By Mr. Morrow): Now, Mr. Schlaugh, referring you to [296-F] Plaintiff's Exhibit 23, which is a letter of May 16, 1952, from Mr. Murphy to the Grace and Company, did that come to your attention?

A. Yes.

Q. Now, what did you do in connection with that document?

A. I sent a copy of this letter to our San Francisco office.

Q. Had you in the meantime received Plaintiff's Exhibit 19 enclosing a purchase order from your San Francisco office? A. Yes, I had.

Mr. Morrow: Your Honor, just so that you know what we are talking about, Plaintiff's Exhibit 19 is a letter from Mr. Gips to Seattle enclosing the purchase order.

The Court: From Gips?

Mr. Morrow: From Gips to Seattle, enclosing the purchase order, and then advising that all instructions should be carried out, and so forth.

Q. (By Mr. Morrow): Now, in reference to the exhibit you have before you, Plaintiff's Exhibit 23, what did you do, Mr. Schlaugh? [296-G]

A. I sent a copy of this letter to San Francisco.

(Testimony of William H. Schlaugh.)

Q. That is a copy of the Seattle Foundry Company letter of May——

A. (Interposing): 16th.

Q. (Continuing): 16th? And you forwarded that under Plaintiff's Exhibit 24, did you, a letter of May 19th from you to San Francisco?

The Court: Exhibit what, Mr. Morrow? Exhibit number what?

Q. (By Mr. Morrow, Continuing): 24, isn't it?

A. Yes, 24. Yes, I did.

Q. Now, what other enclosure was there with that letter?

A. Also a signed copy of the purchase order, the inter-office purchase order.

Q. Can you identify that signed copy of the inter-office purchase order? A. Yes.

Q. And to which exhibit is it attached?

A. It is attached to Exhibit 19, Plaintiff's Exhibit 19.

Q. And it is identified, is it, by being the last copy of export department number 8881? [296-H]

A. Yes, 8881.

Q. 8881? A. Yes.

Q. And down at the bottom there are some initials attached. Whose initials are those?

A. Those are Mr. Vanderbilt's.

Q. Mr. Vanderbilt's? A. Yes.

Q. Now, I notice, Mr. Schlaugh, on this duplicate copy of the purchase order returned to San Francisco the marks and the words "packing" are stricken. A. Yes.

(Testimony of William H. Schlaugh.)

Q. Can you explain that?

A. Well, on this purchase order he has stated under packing that goods must be suitably packed for export shipment with case markings, weights and measurements clearly shown on at least two adjacent sides of all packages and the packages to be numbered consecutively. I struck this because I couldn't see how you were going to put pieces of steel—package them in cases and put all these marks on them and I did not feel it was necessary and I told Clarence that they were going to be shipped loose. [296-I]

Q. Very well; now, in reference to your enclosing and forwarding Seattle Foundry's letter of May 16th to the San Francisco office, can you state whether or not you had any telephone conversations with anybody during that period, or in reference to this matter contained in the letter and particularly in reference to advice—you advised your San Francisco office that:

“Seattle Foundry contacted Pittsburgh Testing Laboratory, Seattle, who did not have a copy of ASTM A-17/29. We would like to have you confirm that this specification has the composition listed in Seattle Foundry Company's letter.”

Where did you get that information?

A. From a telephone conversation.

Q. Do you have a record of that conversation?

A. Yes, I do.

The Court: Mr. Morrow, you just read in part from what exhibit?



(Testimony of William H. Schlaugh.)

Mr. Morrow: Exhibit 24.

Q. (By Mr. Morrow): Where is your record of that?

A. On page 43 of the lumber journal.

Q. And that is Exhibit? [296-J]

A. Exhibit 64. No, excuse me, Plaintiff's Exhibit 55.

Q. And what does that note say?

A. I show a conversation with Jim Murphy where I stated testing was for our account and I have written down, "Pittsburgh Testing have no spec."

Q. I see; now, did you receive a reply to your letter of May 19th to your San Francisco office? That is Plaintiff's Exhibit 24, and is Plaintiff's Exhibit 25 the reply? A. Yes, it is.

Q. Now, what did you do in connection with this information which you received from your San Francisco office?

A. I called Seattle Foundry. I have written in my pencilled notes that I called and wrote Seattle Foundry. Apparently called them and passed the information on and confirmed it by letter, and I also note—have pencilled notes—and wrote Pittsburgh Testing Laboratory on the same date.

Q. Very well; showing you Plaintiff's Exhibit 26, is that the letter that you wrote Seattle Foundry conveying the information you had received from your San Francisco office? A. Yes, it is. [297]

Mr. Morrow: Your Honor, at this time I would like to read this particular letter.

(Testimony of William H. Schlaugh.)

“Seattle, U.S.A. May 23, 1952, Seattle Foundry Co., Inc., 3444 13th Ave. S. W., Seattle, Washington, Attention Mr. James W. Murphy. Gentlemen: Steel Billets, our order 8881. In reply to your letter of May 16th, we have no objection to your pouring both sizes flat, the taper being 4" on item 1 and 3" on item 2. Pittsburgh Testing Laboratory in San Francisco are supplying their Seattle office with the necessary information to inspect this material. The chemical requirements for this order are per ASTM A-17/29, as listed in your letter of May 16th, but one of the physical requirements is as follows:

“The depth of chipping must not exceed 1/16 per 1/8" of diminution up to a maximum of 3/4 of 1".”

“We hope you can find some meaning from this requirement and await your advices.

“Yours very truly,

“W. R. Grace and Company, W. H. Schlauch, Export Department.”

Q. (By Mr. Morrow): Now, you stated you also wrote to the Pittsburgh Testing Laboratory?

A. Yes.

Mr. Morrow: Defendant's Exhibit A-8 [298] in evidence.

Mr. Gantt: No objection.

The Court: A-8 may be admitted.

(Defendant's Exhibit A-8 admitted.)

(Testimony of William H. Schlaugh.)

Mr. Morrow: I would like to read this, your Honor.

The Court: All right.

Mr. Morrow: "W. R. Grace & Co., May 23, 1952. Pittsburgh Testing Laboratory, 2323 Third Avenue, Seattle, Washington, Attention Mr. M. E. Johnson. Gentlemen: With reference to our recent telephone conversation regarding a steel billet order we have placed with Seattle Foundry we understand your San Francisco office will supply you with the necessary information in order that you can make your tests. Yours very truly, W. H. Schlauch, Export Department."

Q. (By Mr. Morrow): Is that the letter, Mr. Schlaugh, you referred to as your having written to Pittsburgh Testing Laboratory on May 23, 1952?

A. Yes.

Mr. Morrow: Plaintiff's Exhibit 27? I have it. I would like to read this.

"Export Department, via air mail, San Francisco, 3295, [299] 5-26-52, steel billets, order 8881, your 9619. Our suppliers are unable to make any sense from the following paragraph contained in your above letter: 'The analysis for chemical requirement is correct while for the physical, the following is required: "The depth of chipping must not exceed  $1/16$  per  $1/8$ " of dimension up to a maximum of  $3/4$  of 1".'"

"Please clarify.

"Yours very truly, W. R. Grace and Company, W. H. Schlauch, Export Department."

(Testimony of William H. Schlaugh.)

Q. (By Mr. Morrow): Plaintiff's Exhibit 27, is that a letter that you sent, Mr. Schlaugh?

A. Yes.

Q. With reference to that letter, what—where did you get the information contained therein?

A. From the telephone call from Mr. Murphy.

Q. And about the same time?

A. About the same time.

Q. Referring you to Plaintiff's Exhibit 28, a reply from Mr. Gips—

Mr. Morrow: May I read this, your Honor?

The Court: Yes.

Mr. Morrow: Received in Seattle, "June 3, 1952." [300]

"Gentlemen, your letter 3295. Please be advised that the paragraph to which we refer in your above mentioned letter quoted from our 9619 should have read:

"The depth of chipping must not exceed  $1/17$  per inch of section to a maximum of  $3/4$  of 1". Please contact suppliers and inform us when they expect this order to be ready for shipment, so that we may make timely arrangements with the New Zealand Government forwarding agent for shipment of this material. Very truly yours, W. R. Grace and Company, C. G. Gips, Export Department."

Q. (By Mr. Morrow, Continuing): That letter was received by you, was it, Mr. Schlaugh?

A. Yes.

Q. What did you do in connection with that letter?

(Testimony of William H. Schlaugh.)

A. I telephoned Mr. Murphy to pass this information on.

Mr. Morrow: Plaintiff's Exhibit 29 has been admitted in evidence. "San Francisco 3321, 6/2/52. Steel Billets, order 8881, your 9647. The clause you quote regarding chipping still does not seem to be clear. It might be well to consult your testing laboratory and have them translate this into something clear and concise that will be understood by Seattle Foundry [301] Co. and by you and us as well. Yours very truly, W. R. Grace and Company, W. D. Vanderbilt, Manager."

Q. (By Mr. Morrow): Mr. Schlauch, does this letter recall to you any conversation you might have had, or did you have anything to do with that particular matter?

A. It is my recollection that I telephoned Seattle Foundry upon receipt of Plaintiff's Exhibit 28 from San Francisco. Mr. Murphy said that this clause is still not clear. Then I had a discussion with Mr. Vanderbilt about it and that is when Mr. Vanderbilt dictated this letter, which is Plaintiff's Exhibit 29, to San Francisco.

Q. Referring you to the following wire, from you to—from your Seattle office to your San Francisco office, dated July 21, 1952, being Plaintiff's Exhibit 30:

"84 Seattle Foundry advise one heat consisting of 8 billet tested by them as not over .80 manganese but Pittsburgh's test ran .85 manganese. Both tests ran .21 carbon. Suppliers request we cable for

(Testimony of William H. Schlaugh.)

buyers authority ship since more manganese actually makes stronger billet."

Did you have anything to do with that wire?

A. Yes, I did.

Q. What did you have to do with it? [302]

A. I prepared the wire.

Q. Where did you get the information therein contained?

A. I believe I obtained it from a telephone conversation from Mr. Murphy of Seattle Foundry.

Q. Did you receive a reply from your San Francisco office? A. Yes.

Q. I will ask you if this is the reply that you received, dated July 21, 1952, being Plaintiff's Exhibit 31?

The Court: I recall that if you want to show it to him.

Mr. Morrow: Do you recall it?

Q. (By Mr. Morrow, Continuing): Is that the wire you received? A. Yes, it is. [303]

\* \* \*

Q. Now, following receipt of Plaintiff's Exhibit 31, being the wire from your San Francisco office, did you instruct Pittsburgh Testing's Representative to "\* \* \* accept eight billets; however, no further exceptions will be allowed in the future"? Did you so advise Pittsburgh Testing Laboratory? A. Yes.

Q. I will ask you if this Plaintiff's Exhibit 32, admitted in evidence, is your advice to Pittsburgh?

(Testimony of William H. Schlaugh.)

A. Yes, it is confirmation of my advice. I advised him by telephone.

Q. Will you read it? You advised him by telephone?  
A. Upon receipt of that wire.

Q. Referring to Plaintiff's Exhibit 31——

A. (Interposing): Yes.

Q. (Continuing): who did you talk to?

A. Mr. Sata.

Q. What date was it? [304]                      A. July 21st.

Q. Who is Mr. Sata?

A. An employee of the Pittsburgh Testing Laboratory.

Q. Now, referring you again to Plaintiff's Exhibit 32——

Mr. Morrow: Well, I will read it, if I may, your Honor.

“July 22, 1952. Pittsburgh Testing Laboratory, 2323 Third Avenue, Seattle, Washington, Attention Mr. Sata. Gentlemen: Our order 8881, steel billets, Seattle Foundry Co. We conform telephone conversation yesterday wherein we instructed you to accept for shipment the eight steel billets under Seattle Foundry's heat number 41 and which ran a manganese test of .85 instead of the allowable limits of .50/.80. Our San Francisco office have given us this authority, but they do advise that no further exception will be allowed in the future.”

Attached to this exhibit is a chemical analysis by Northwest Laboratories which I will not read unless Counsel desires it.

(Testimony of William H. Schlaugh.)

Q. (By Mr. Morrow, Continuing): Now, referring you to Plaintiff's Exhibit 33, which has been admitted in evidence, Mr. Schlaugh, will you state what the [305] occasion was, or the circumstances, rather, were under which that letter went out?

A. This letter was written at the request of Mr. Vanderbilt, the manager, supplementing my letter of July 22nd. He thought my letter of July 22nd was not all inclusive in that a loop hole might be left in it. Therefore, on July 23rd I wrote this supplementing letter.

Q. Will you read Plaintiff's Exhibit 33, please?

A. "Pittsburgh Laboratories, Attention Mr. Sata. Supplementing our letter of July 22nd regarding the eight billets under Seattle Foundry's Heat Number 41 which ran a manganese test of .85 instead of the allowable limits of .50/.80. Our buyer has authorized us to accept these billets provided they meet all the other requirements of the order."

Q. "Yours very truly, W. R. Grace and Company;" and is that your signature?

A. This is not the original letter.

Q. I see.

A. But I signed the original letter. [306]

\* \* \*

Q. Mr. Schlaugh, I refer you to the invoices of the Seattle Foundry Company, Inc., and cancelled checks in payment thereof, being Plaintiff's Exhibit 36—



(Testimony of William H. Schlaugh.)

Mr. Morrow: Which, by the way, your Honor, is the subject of an admitted fact in the pretrial order.

Q. (By Mr. Morrow, Continuing): I will ask you if you are [307] familiar with those invoices?

A. Yes, I am.

Q. Did they come over your desk?

A. Yes.

Q. And where they approved by you before payment? A. Yes.

Mr. Morrow: I would like to read the parts of the invoices referring to the specifications, if I may, your Honor!

The Court: All right.

Mr. Morrow: "166 ASTM A-17/29, Type A, Grade 2, Size 9½" by 4" by 4' 4½" "

So many net tons and the amount. That was invoice number 04247.

Invoice number 04267, dated July 25, 1952.

"176 ASTM A-17/29, Type A, Grade 2, 9½' by 4" by 4' 1½"."

The weight and the amount and the totals.

Invoice number—4390, dated August 22, 1952.

"408 ASTM A-17/29, Type A, Grade 2, 9½" by 4' by 4½"."

Tonnage, weight, and so forth. [308]

"54 ASTM A-17/29, Type A, Grade 2, Size 6" by 3" by 10' billets."

Q. (By Mr. Morrow): Mr. Schlaugh, do these invoices represent the material you purchased from the Seattle Foundry? A. Yes.

(Testimony of William H. Schlaugh.)

Mr. Morrow: That is all I have to ask the witness at this time.

### Cross-Examination

By Mr. Gantt:

Q. Mr. Schlaugh, will you tell us how you happened to keep the exhibits 54 and 55, which have been designated and referred to as export journal and lumber journal respectively? Tell us how you made them in the course of your business. What matter you put in them as a rule.

A. Well, I will tell you why I started them. I used to write down telephone conversations on a little scrap of paper or a scratch pad and I would have a whole lot of little scratch pads on my desk and when I wanted to refer to them I would lose them and I couldn't keep good track of my conversations and sometimes there was data which I would have to write down, especially lumber specifications, size [309] and footage and prices, which I wanted to have. Therefore, I instituted the books.

Q. Well, do the little notes that you have in there, do they contain the important things or what you thought were the important points of those conversations?

A. No, not always. I think it is part of a form of doodling also. When I talk about something I usually write down maybe one or two words once in a while. It doesn't always mean it is the gist of the conversation.

(Testimony of William H. Schlaugh.)

Q. Is it then not a complete record of each conversation?

A. It is not; not, it is not a complete record.

Q. But you made those notes at the time you actually had those telephone calls?

A. In most instances, yes.

Q. Did you have those journals at your desk at all times?      A. Yes.

Q. It was a rather automatic move, just to jot down as you were talking on the telephone?

A. Yes.

Q. You stated that in your experience in the export department at W. R. Grace and company you [310] hadn't handled any steel orders prior to this one; is that correct?      A. That is correct.

Q. But that you had dealt with ASTM specifications before?

A. As far as dealing with them, no.

Q. Well, you had had—rephrase that this way: You had taken orders on lumber piles?

A. Piling.

Q. Piling; filled orders for your customers with lumber according to certain specifications; is that what you mean?

A. Yes; we had placed the orders with the supplier, maybe fifty pieces of piling, eighty feet, grade one, as per ASTM specification.

Q. Had you ever read any of those ASTM specifications?

A. I believe we have the one—we may have the one copy in our office pertaining only to piling.

(Testimony of William H. Schlaugh.)

Q. So that you had occasion to refer to it?

A. Actually, I think that—as I recall we got the specification later and I don't believe I referred to it more than once or twice. I actually had no occasion to.

Q. You had it on your desk though? [311]

A. No.

Q. Well, in your office?

A. In the office, yes.

Mr. Morrow: Did I understand you are referring only to ASTM for piling?

Mr. Gantt: I am referring to the one he stated he had in his office.

Q. (By Mr. Gantt): Which related to lumber piling? A. Yes.

Q. Not the one relating to steel; you didn't have that one? A. No.

Q. And you didn't consult that one at the time you were sending out your letters of inquiry?

A. No.

Q. Or at any time prior to—after this claim arose? A. No.

Q. Would that be a correct statement?

A. I never referred to it.

Q. You didn't feel that was necessary?

A. No, I did not.

Q. In other words, when you got the inquiry from San Francisco's office, which is Exhibit 2, I [312] believe, you didn't take it upon yourself to find out what ASTM specification A-17/29 meant? A. No.

(Testimony of William H. Schlaugh.)

Q. Why didn't you do that?

A. Pardon me?

Q. Why didn't you take it upon yourself to consult some source for what was meant by that particular specification?

A. I felt that the suppliers would have that information. If they were quoting me on so many steel billets as per these specifications, they would be familiar with them.

Q. But this was prior to the time you had actually sent out the letter of inquiry; you didn't consult the specification and you didn't feel it was necessary to do that?

A. No.

Q. Then in fact did you know what these steel billets were at that time?

A. Pardon me?

Q. Did you know what steel billets were at that time?

A. No, I did not.

Q. Did you make any effort to find out?

A. No. [313]

Q. Is it customary to deal with products that you don't know what they are?

A. Yes. I mean, steel billets, going back to the inquiry, it was listed so many steel billets and they had the size and the specification, I knew that they were made out of steel and I knew they were a certain size, and if we purchased them, or if the supplier quoted us a price on the basis of these specifications, I was satisfied.

Q. Then were you relying on the supplier to furnish you the products according to the specifications?

A. Yes, we were.

Q. You also stated, I believe, that the products

(Testimony of William H. Schlaugh.)

you mainly handled under prior years or in your prior employment with Grace in the export or import department in Seattle has been mainly lumber, is that correct?      A. yes.

Q. And you have also dealt in wheat, flour, salmon, oats, pulp and other miscellaneous orders?

A. (Witness nodded in the affirmative.)

Q. I believe you also stated that your duty was to get quotations and products from suppliers at the lowest possible price; is that correct? [314]

A. No, it is not. I didn't want to stress that particular phase. What I meant when I said that was making the rounds, of going to—trying to—locate all possible suppliers.

Q. Was that an important factor?

A. It was to contact everybody we could that we felt could supply the product.

Q. Did you usually give the order to the lowest supplier, to the supplier who quoted you the lowest price?

A. It all depends; sometimes we did and sometimes we didn't.

Q. I believe you also testified that upon receipt of Exhibit 2, which is the letter of April 17, 1952, Mr. Gips in San Francisco requesting you to get information or to get offers on products—billets—you sent out quite a few letters. Now, Exhibit 3—excuse me, I think you have it.

A. I think I have them all.

Q. I think it is right here on the bottom. Now, Plaintiff's Exhibit 3, I believe, is four letters, or

(Testimony of William H. Schlaugh.)

copies of four letters, by you and those are to what companies, addressed to what companies?

A. Seidelhuber, Olympic Steel Works, Isaacson's and Seattle Foundry. [315]

Q. And you sent other letters out in addition to those?

A. I believe I sent letters out to the other firms listed.

Q. Now, you say "the other firms listed." You mean the other firms who appear—whose names appear in pencil on Exhibit 2?

A. That is correct.

Q. And you made all those notes? A. Yes.

Q. Those pencilled notes? A. Yes.

Q. Where are the copies of those letters?

A. I don't know.

Q. You didn't keep them?

A. Well, I think we kept them. They could not be located in the files.

Q. I believe you also testified that you found those—that you got the names of these other companies in addition to Seidelhuber and Isaacson from the telephone book? A. Yes.

Q. How did you go about that?

A. As I testified previously, I looked in the classified section under foundries. [316]

Q. Will you tell us whether you found Isaacson Iron Works and Seidelhuber—what is referred to there, Seidelhuber Iron and Bronze Works, Inc., under the telephone classified directory under foundries?

A. At that time I don't remember whether I saw

(Testimony of William H. Schlaugh.)

them or not because I knew I was going to send the inquiry to Seidelhuber and Isaacson anyway by letter. After the claim arose we had occasion to look in the telephone book at the time of my deposition and I believe we found that they were not listed.

Q. Isaacson's and Seidelhuber are not listed under steel foundries in the classified section?

A. No, they were not.

Q. How did you happen to look under steel foundries anyway?

A. I felt that was the logical place to look.

Q. Do you know the definition of the word "foundry"?

A. No, I do not.

Q. You haven't had occasion to look it up, have you?

A. No. [317]

Q. Are there other sections in the classified 'phone book dealing with steel companies in Seattle; there are, aren't there?

A. Presumably there are, yes.

Q. You didn't consult any of those though?

A. No.

Q. Now, Mr. Schlaugh, you stated that—on direct—you had received, or, rather, sent out an inquiry to N. and S. Foundry. I believe that is one of these on Exhibit 2 at the bottom of the list. Is that N. and S. Foundry?

A. Yes.

Q. You believe you sent them a letter of inquiry?

A. Yes.

Q. Did you hear from them?

A. I would have to refer to my journals. I have



(Testimony of William H. Schlaugh.)

since noted that I had a telephone conversation with them.

Q. I wonder if you will refer to your export journal, Plaintiff's Exhibit 54, and page 51, please. Is there anything appearing on that page referring to a telephone conversation with anybody?

A. Yes, there is the name Rogers, and N. and S. [318]

Q. And what is directly below that?

A. The word "sandcast."

Q. What is the date of that conversation, presumably?

A. Somewhere between April 25th and April 28th.

Q. Now, does that note indicate that the word sandcast came up in that conversation?

A. Yes, it does.

Q. And this conversation with Mr. Rogers of N. and S. Foundry had to do with the letter of inquiry you sent out to N. and S. Foundry?

A. Yes.

Q. Presumably "sandcast" had to do with the billets, as that was what you were seeking to get supplies of, is that correct?

A. I couldn't say that was correct. All I know is that it came up in the conversation and there is "sandcast."

Q. But you were making inquiry to get an offer on billets, weren't you?

A. Yes, I was.

Q. Steel billets?

A. Yes.

Q. And you don't know how the words [319] came up in the conversation?

A. At this time I can't recall.

(Testimony of William H. Schlaugh.)

Q. No independent recollection? A. No.

Q. Now, did you have occasion to hear from anyone at Seidelhuber on the telephone—by telephone conversation? A. I believe I did.

Q. I wonder if you would—would consult your notes and refresh your recollection as to that conversation? A. Yes.

Q. And will you consult page 53 of Exhibit 54, which you have before you, which would be the export journal? A. Yes.

Q. Check if there is anything there to indicate a conversation with anyone at Seidelhuber?

A. Yes, there is.

Q. Would you read that for us, please? First, give us the page you are reading from and the exhibit.

A. Page 53. The exhibit number, you mean?

Q. Yes, please. A. Exhibit 54. [320]

Q. All right.

A. Starting out with "Mr. Seidelhuber \* \* \*"

Q. (Interposing): I wonder if you could give us approximately the date? Is there an indication on the page as to what date that might have been?

A. Yes; April 30th.

Q. April 30th; pardon me, I didn't mean to interrupt you. Will you read it now?

A. "Mr. Seidelhuber. Forging quality ingots—billet quality 1800 12 by 12-54; 65/6700 20 by 20 up to 70"; 12,000 pounds; 25 by 25 up to 59." What part of loco. Wire immediately as not on strike. Price."

No. 15408

---

**United States  
Court of Appeals**  
*For the Ninth Circuit*

---

GRACE & CO. (Pacific Coast),

Appellant,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,

Appellee.

---

**Transcript of Record**  
**In Two Volumes**

---

**Volume II**  
**(Pages 271 to 546)**

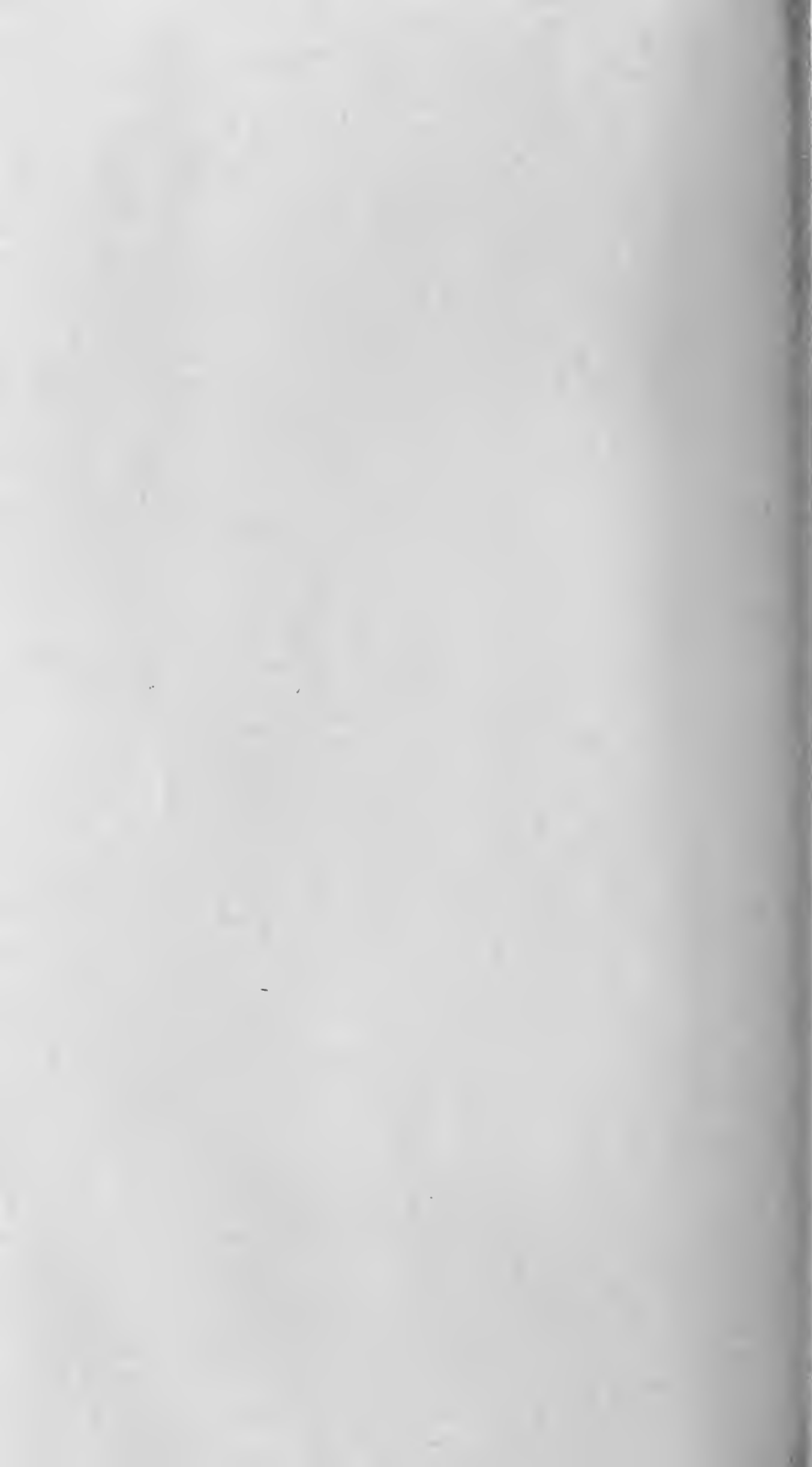
---

**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**

**FILE**

APR - 1 1957

PAUL P. O'BRIEN, C



No. 15408

---

**United States  
Court of Appeals**  
For the Ninth Circuit

---

GRACE & CO. (Pacific Coast),

Appellant,

vs.

PITTSBURGH TESTING LABORATORY, a  
Corporation,

Appellee.

---

**Transcript of Record**  
In Two Volumes

---

**Volume II**  
(Pages 271 to 546)

---

**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**



(Testimony of William H. Schlaugh.)

Q. Do you have any recollection of discussing with Mr. Seidelhuber in that conversation what he meant by forging quality ingots, billet quality?

A. No, I do not.

Q. But you apparently did discuss it with him?

A. I did and I wrote this down and then I passed this information on to San Francisco.

Q. Correct; in a later letter to Mr. Gips?

A. Yes, sir.

Q. I believe the letter of May 1st?

A. (Witness nodded in the affirmative.)

Q. In which you quoted the Isaacson [321] price; is there anything else appearing on page 53 of Exhibit 54, your export journal, relating to any other conversations with any of the other suppliers to whom letters were sent out?

A. Yes; there is a conversation with Mr. Hargos of Isaacson.

Q. That was what date?

A. April 30th also.

Q. Mr. who?

A. Hargos, H-a-r-g-o-s (spelling).

Q. Of Isaacson Iron Works? A. Yes.

Q. What do your notes indicate on that?

A. It indicates that Isaacson quoted me a price.

Q. What were the prices that Mr. Hargos quoted you according to your notes?

A. On the 750 billet item the price of \$156.50 and on the item for fifty billets the price of \$177.50 F.O.B. cars, plant.

Q. Now, handing you what is marked Exhibit 5—and I believe this is the letter of May 1, 1952,

(Testimony of William H. Schlaugh.)

which you wrote to Mr. Gips giving him the information about the Isaacson offer and the Seidelhuber information you had received in those telephone conversations [322] —what are the prices there shown for Isaacson?

A. The prices are shown as \$157.50 and \$178.50.

Q. Wherein did that dollar difference come from? A. You will note——

Q. Of course, your notes there indicate that the price was \$177.

A. (Continuing): You will note from these notes these prices, \$156.50 and \$177.50 are listed as F.O.B. cars, plant, meaning F.O.B. cars at Isaacson Iron Works, and the prices I quoted San Francisco was F.O.B. cars, dock, Seattle, so I added one dollar on each item for the switching charge.

Q. I see; that is fine. Now, I believe you testified that among the suppliers that you made inquiry of here was Pacific Car and Foundry. Do you recall any letters or correspondence with Pacific Car and Foundry, or telephone conversations?

A. I would have to refer to——

Q. (Interposing): I wonder if you would refresh your memory by looking at page 55 of the export [323] journal, Exhibit 54, and examine it to see if there is anything to indicate whether you discussed the offer with Pacific Car and Foundry?

A. Yes, there is.

Q. What date does it appear to be?

A. May 2nd.



(Testimony of William H. Schlaugh.)

Q. May 2nd; will you read us what your notes indicate there?

A. "Mr. Drummond, P. C. & F. 17/29 is obsolete specif. allows either carbon or alloy steel. What delivery." Down below: "Rolled or cast," and a line drawn underneath "cast" and the word "ingots."

Q. Do you recall that telephone conversation with Mr. Drumond?

A. I don't recall it any more than my notes indicate. I know I talked with him.

Q. And "P. C. and F." stands for Pacific Car and Foundry, does it?      A. Yes.

Q. Now, Mr. Schlaugh, you have examined your export journal and you have seen from that that you had a telephone conversation sometime between April 4th—I mean, April 25th and April 30th with Mr. Rogers at N. and S. in which he mentioned sandcast and a conversation with someone at [324] Seidelhuber mentioning forging quality ingots, which apparently was made April 30th, and a conversation on May 2nd with Mr. Drumond of Pacific Car and Foundry in which the subject of rolled or cast ingots was mentioned; is that correct?

A. That is correct.

Q. Your notes indicate that?      A. Yes.

Q. Now, as of that time, that telephone conversation with Mr. Drumond, did you do anything about—or make any consultation with anyone as to what these terms meant, rolled or cast ingots as used by Mr. Drumond, for example?

A. No, I did not.

Q. Sandcast as used by Mr. Rogers?

(Testimony of William H. Schlaugh.)

A. No.

Q. And quality forging ingots by Mr. Seidelhuber?

A. Well, I passed that information on to San Francisco.

Q. You passed that information on?

A. Yes.

Q. You didn't pass on the information from Pacific Car and Foundry?

A. No. They couldn't quote—neither [325] supplier could quote—a price so that I saw no reason to say anything about those suppliers.

Q. You didn't then consult an expert as to what was meant by those terms? A. No.

Q. Now, when was the first telephone conversation you had with Mr. Murphy of the Foundry? Do your notes indicate?

A. Well, there was a conversation between the 25th and 2nd, on page 55 of the export journal. Possibly that was the first conversation. I don't know.

Q. Page 55? A. Yes.

Q. And what do your notes show on that?

A. It shows Jim Murphy, Seattle Foundry, 5½ and 6 cents a pound. The next line is \$120; next line is sandcast.

Q. And when did that conversation take place?

A. Sometime between April 25th and May 2nd.

Q. May I see that just a moment, where you are referring to? A. Right here. [326]

Q. Do you have any independent recollection of

(Testimony of William H. Schlaugh.)

when that conversation was other than between these dates?      A. No, I do not.

Q. Now, I understand that—I believe you have testified that—you had to send Mr. Murphy another copy of the specifications. Handing you Exhibit 4, is that your letter to Mr. Murphy, dated May 1st?

A. Yes, it is.

Q. And would that—does that help you place the time you may have had this telephone conversation with Mr. Murphy?

A. Possibly this conversation was upon receipt of Mr. Murphy's receiving this second specification.

Q. How did you know to send Mr. Murphy the second specification? Did he write you a letter?

A. He telephoned me.

Q. Could that have been the telephone conversation right here?

A. I can't place that. It could have been. I have no way of knowing if it was.

Q. But Mr. Murphy did mention the phrase sandcast, didn't he? [327]      A. Yes.

Q. And in what connection did he mention it?

A. I don't recall.

Q. Did he mention any connection with the billets that he was supplying?

A. I don't recall.

Q. Now, I believe you have testified that you received a letter from Mr. Murphy. Handing you what has been admitted as Exhibit 7, the letter is dated what date, Mr. Schlaugh?

A. May 2nd.

(Testimony of William H. Schlaugh.)

Q. May 2nd? A. Yes.

Q. 1952? A. Yes.

Q. And that is written by Mr. Murphy to you or to your attention? A. Yes.

Q. Now, may I have that just a moment?

A. (Witness hands document to Counsel.)

Q. Was this the first written offer you received from Seattle Foundry? A. I believe it is.

Q. Now, I see some pencil marks there on the letter. [328] A. Yes.

Q. Were those made by you? A. Yes.

Q. May I have it a moment?

A. (Witness hands document to Counsel.)

Q. All of these pencil marks on here were made by you; is that correct? A. Yes.

Q. Where did the the information come from which you put down on those notes?

A. Possibly—I mean undoubtedly from Seattle Foundry, Jim Murphy.

Q. From a telephone conversation with him?

A. Yes.

Q. Now, Mr. Schlaugh, I note that some of these notes say approximate weight 515 pounds, and then you have another here on Exhibit 7, after it is written or typed, \$120 per net ton or \$123 F.O.B. cars plant. A. Yes.

Q. I think that is \$123.00? A. Yes.

Q. And down after item two you have \$175 per net ton or \$133 F.O.B. plant. A. Yes. [329]

Q. You have testified earlier as to that; now, Mr. Schlaugh, down at the bottom of the letter is something about Nieder and Marcus; is that right?

(Testimony of William H. Schlaugh.)

A. Yes.

Q. Who are Nieder and Marcus?

A. It is a firm located across the street from Seattle Foundry Company.

Q. What kind of a firm are they?

A. I believe they handle scrap. I don't know.

Q. And this note appears to be N. P.

A. Yes.

Q. What does that stand for?

A. Northern Pacific.

Q. Does that mean they have a spur track into Murphy's plant?

A. No. It meant that Seattle Foundry did not have a spur so that it was necessary to truck these billets across the street to Nieder and Marcus who did have a spur on the Northern Pacific line.

Q. Now, your letter from Mr. Murphy, will you read for me the letterhead on the letter which is Exhibit 7?

A. Seattle Foundry Company, Inc.

Q. Yes; please read it all. [330]

A. "Successors to Tennent Steel Casting Co. Inc."

"Manufacturers quality 'Electric' Steel Castings. Elliott 3274."

Keep going?

Q. I think that is enough. I think that is—well, it then says:

"Seattle 4, Washington"?

A. Yes.

Q. Is that indication to you that—or was it any

(Testimony of William H. Schlaugh.)

indication to you that that was the business of this company, making steel castings?

A. I didn't see the lower print. I don't think anyone usually reads the lower print, just the common letterhead.

Q. The word "casting" appears in there twice, doesn't it? A. Yes, it does.

Q. Now, in connection with this letter, when did you receive it? Does the letter indicate when it was received by you? A. On May 5th.

Q. May 5th? A. Yes.

Q. Do you have any idea when you may have talked with Mr. Murphy and gotten the information [331] you have written down in pencil on the exhibit?

A. Are there telephone conversations referring to it?

Q. I don't know if there are. I am asking you now if you have any recollection of when you did.

A. Would you repeat your question?

Q. Well, I will strike the question and start over.

Do you have any recollection of the date? You say you received this on the 5th? A. Yes.

Q. Do you have any recollection of the date on which you may have talked to Mr. Murphy on the 'phone and written those notes down?

A. I would assume it would have been May 5th upon receipt of the letter, but I don't know.

The Court: The question was: You have no recollection?

(Testimony of William H. Schlaugh.)

The Witness: No independent recollection.

Q. (By Mr. Gantt): No independent recollection; now, on the margin in this letter appears to be something that was erased. It seems to be some pencil marks that [332] were erased. Can you make out what those were, what those words say?

A. They say: "Cast steel from sand molds."

Q. They were erased but you can still read them?

A. That is right.

Q. Did you get that information from Mr. Murphy?

A. Apparently, yes.

Q. What is this? This also was erased. What does that say, or can you read it?

A. "'phone conversation."

Q. Now, did that mean you had a 'phone conversation with Mr. Murphy after receipt of this letter and that Mr. Murphy mentioned cast steel from sand molds; is that correct?

A. No, I can't assume that because this 'phone conversation is right next to this \$130.00.

Q. I see.

A. And possibly—you know—he called in later and corrected his price.

Q. Changed his price?

A. So that I feel I wrote 'phone conversation in there to show that I received that \$130.00 over the 'phone. [333]

Q. Now, why did you erase these words, "cast steel from sand molds"?

A. I can't recall actually erasing them. In fact,

(Testimony of William H. Schlaugh.)

I was very surprised at my deposition to see that they had been erased.

Q. Do you know you did it?

A. Well, I must have done it. No one else saw the letters and if I did it it was done after the claim arose.

Mr. Gantt: I would like to show this to your Honor.

(Whereupon, document was handed to the Court by Counsel.) [334]

\* \* \*

Q. (Continuing): Well now, Mr. Schlaugh, did you have occasion to write your San Francisco office and tell them about the offer you had received from—did you have occasion to write your San Francisco office and advise them of the offer you had received from Seattle Foundry? A. Yes, I did.

Q. Is the letter of May 8th from you to San Francisco, Exhibit 9, is that your answer—or, rather, is that your letter to San Francisco advising them of Seattle Foundry's—

A. (Interposing): Yes, it is.

Q. (Continuing): quotation?

May I have that a moment?

The Court: It is Exhibit? [335]

Mr. Gantt: This is Exhibit 9, your Honor. It is dated May 8th. Signed by Mr. Schlaugh.

Q. (By Mr. Gantt, continuing): That is your signature? A. Yes.

Q. Now, you say in this letter, after quoting the item numbers and the price and the F.O.B. price,



(Testimony of William H. Schlaugh.)

and something about not making item two unless proper priorities are released to obtain the nickel, and then you say item two, F.A.S. Seattle, and suppliers can ship sixty to ninety days of the order, and then you have a new paragraph:

“These billets are cast steel from sand molds and item one will weigh approximately 515 pounds each and item two 604 pounds each.”

Can you tell us now—I want you to look at Exhibit 7 and Exhibit 9 and tell us if you remember where you got the information contained in the last paragraph of the letter, Exhibit 9.

A. I obtained that information from Seattle Foundry, Mr. Jim Murphy.

Q. Is the phrase that you erased, “cast steel from sand molds,” is that similar to your phrase appearing [336] in your letter?

A. That is correct.

Q. And so you passed that on to San Francisco?

A. That is right.

Q. And that was information you had received from Mr. Murphy as to how the billets would be made?

A. Pardon me?

Q. As to how the billets would be made?

A. Well, not necessarily. “Cast steel from sand molds”—he was giving me some information about the billets.

Q. He was telling you what the billets were; these billets are cast steel from sand molds.

Mr. Morrow: Objected to as argumentative.

(Testimony of William H. Schlaugh.)

The Court: What is the letter? Are you asking the words in the letter? Is that what you are asking?

Mr. Gantt: Yes.

A. Yes, it says, "These billets are cast steel from sand molds"; that is right.

Mr. Gantt: All right. [337]

\* \* \*

Q. Mr. Schlaugh, prior to the adjournment we were discussing, or we had—you had—testified about the conversation with Mr. Murphy shortly after receiving his order, or his offer, for the billets, the first offer on the billets, his letter of May 2nd to Grace of Seattle, and about you having written down the note about sand cast or cast steel from sand molds. Do you recall that? A. Yes. [338]

\* \* \*

Q. Now, I would like to ask you, Mr. Schlaugh—you said you had probably made the erasure of the words "cast steel from sand molds" appearing on the Exhibit Number 5—7—after a telephone conversation with Mr. Murphy—this erasure that we have talked about on Exhibit 7, you said you probably erased those words on and after the claim arose; is that correct?

A. If I erased them it would have not been before then.

Q. Now, did you have the file in this matter until the claim arose?

A. We had all the papers; yes.

(Testimony of William H. Schlaugh.)

Q. Were they under your—were they in your possession and control in the office?

A. No; they were all filed generally. The purchase order was filed one place and Seattle Foundry's letters filed in the Seattle Foundry file. [339] They were all separated. It wasn't one complete file.

Q. But they were all under your general control since this was your order?

A. They were all in the office.

Q. Yes; now, had the erasure been made prior to the time of your deposition? A. Yes it had.

Q. On October 14, 1954?

A. That is when I had first seen that it was erased.

Q. Would you say then that the erasure was made between the time the claim arose and the time of your deposition, October 14, 1954? A. Yes.

Q. Yes; and did you have in your possession and under your control in your office in Seattle here the files, including Exhibit 7, during the period from the time the claim arose until the time of your deposition?

A. I believe those files—yes, they were down in the basement of our room, as I remember, because it was the year before.

Q. That is, up until the time of your deposition? [340] A. Yes.

Q. Now, Mr. Schlaugh, in the initial letter you received, Exhibit 1, from—I beg your pardon, Exhibit 2, from Mr. Gips, I believe there is a reference to nearest equivalent with regard to these specifica-

(Testimony of William H. Schlaugh.)

tions; is that not correct?      A. That is correct.

Q. In other words, the exhibits states here, "Steel billets, specification ASTM A-17/29, type a, grade two, or nearest equivalent." Did you know at the time you received Plaintiff's Exhibit 2 what the words "nearest equivalent" meant?

A. No, I did not.

Q. Did you undertake to find out?      A. No.

Q. At no time?      A. At no time.

Q. Did you know what the nearest equivalent ASTM specification was?      A. No. [341]

\* \* \*

The Court: Do you wish to add?

The Witness: Yes, I think I should for the answer. It said not the nearest equivalent of ASTM 17/29 but the nearest equivalent of grade two. At the top is listed "steel."

The Court: We understand.

Mr. Gantt: I object to that answer, your Honor. I think—I move that the answer be stricken.

The Court: The Court will not strike the answer.

Mr. Gantt: All right, your Honor, I will proceed to another point.

Q. (By Mr. Gantt): Now, did the—do you know or recall whether the proposal from Isaacson Iron Works that you received on or about May 2nd referred to the phrase "nearest equivalent"? I hand it to you at this [344] time, in describing the specification.

A. No. their proposal did not state nearest equiv-

(Testimony of William H. Schlaugh.)

alent. The proposal shows there, grade two and grade one, respectively. That is shown here.

(Whereupon, Mr. Savage returned to the court room.)

Q. How did they describe the billets in their proposal? Read that to us from the exhibit. What exhibit number is that? A. 6.

Q. Exhibit 6.

A. "750 steel billets, 9½" by 4" by 48½", to meet ASTM spec. A-17/29, type A, grade two"; and "50 steel billets, 6" by 3" by 120" to meet ASTM spec. A-17/29, type A, grade one."

Q. Now, do you recall offhand whether the price quotations you received from Seattle Foundry on May 5th, being Exhibit 7, uses the phrase, "to meet specification," "billets to meet specifications"?

A. You want me to read what it says?

Q. No, I want you to, to say whether, upon looking at it, it says "to meet."

A. No, not "to meet."

Q. Now, Mr. Schlaugh, prior to sending out the letter of inquiries to the various steel [345] suppliers up here, including Seattle Foundry, did you know anyone at Seattle Foundry? A. No.

Q. You had no personal knowledge of any employee down there?

A. Not an employee at that time.

The Court: When you say you didn't know "an

(Testimony of William H. Schlaugh.)

employee at that time," you mean you didn't know——

The Witness (Interposing): I didn't know an employee working there at the time I placed the inquiry with them.

The Court: You did not?

The Witness: No.

Q. (By Mr. Gantt): Did you know an employee who had worked there prior to that?

A. Yes, I did.

Q. Who was that?

A. Her name was Irma DeMaio.

Q. Irma DeMaio? A. Yes.

Q. What position did she have at the time?

A. I don't know what position. So far as I knew, it was just office help, office work. [346]

Q. How did you know Irma DeMaio?

A. Her husband worked at the Grace Seattle office.

Q. In what position; did he work there at that time? A. Yes.

Q. At the time you made the inquiry?

A. I believe he did.

Q. In what position?

A. He was port steward.

Q. I believe you testified that you received a letter, Exhibit 10, from Mr. Gips concerning checking the prices or the quotations of Isaacson and Foundry. You received that letter on what date?

A. May 12th.

(Testimony of William H. Schlaugh.)

Q. And what did you do about checking the prices?

A. I telephoned Mr. Murphy of Seattle Foundry and, as testified earlier, I requested he go over his specifications and prices to make sure he was quoting according to ASTM specifications and the prices—he went over the prices to make sure that his quotation was correct.

Q. And did he do that on the 'phone with you?

A. Yes, he did. [347]

Q. And did he at that time change or lower his price on item two?

A. Possibly that could have been the telephone conversation in which he lowered his price.

Q. Would you examine Exhibit 54, at page 58? That is your journal. The top of the page.

A. Yes.

Q. What does that indicate was written there?

A. It indicates that a telephone conversation was had with Mr. Murphy on May 12th and there is listed item two, \$130.00, for two thousand pounds.

Q. Now, does that represent a change in his price? A. Yes, it would indicate.

Q. And was that a reduction in his price?

A. I believe it was.

Q. A reduction from \$175 to \$130 a ton on item two; is that correct.

A. I would have to check to see.

Q. Handing you Exhibit 7, being his original quotation. A. Yes, it was.

(Testimony of William H. Schlaugh.)

Q. So then, upon checking with him the [348] price went down even farther; is that correct?

A. That is right.

Q. Did you check with Isaacson also?

A. No, I did not.

Q. In that connection I refer you to page 59 of your journal at the top of the page. Is there an indication there that you may have talked to Isaacson?

A. Yes.

Q. And what does that note read, and also can you tell us what that telephone conversation was?

A. Somewhere between the 12th and the 13th.

Q. Would you say then it was on the 12th?

A. It could have been, yes.

Q. And then will you read us what is upon your journal on page 59?

A. Two operations, roll to size, could reduce five or ten. O.K.

Q. Is that the note made during your conversation with Isaacson Iron Works? A. Yes.

Q. On May 12th? A. Yes.

Q. Did you discuss with Isaacson during [349] that conversation the difference in the price between your Foundry offer and Isaacson's offer?

A. No, I did not.

Q. Did you divulge to Isaacson that you were considering another supplier?

A. I don't believe that I did.

Q. Did you use the name Seattle Foundry in the conversation at all?

A. I do not recall that I did.



(Testimony of William H. Schlaugh.)

Q. What did the words "roll to size" mean to you at that time?

A. Just what it would mean to me now, just rolling down to size, I guess.

Q. You have heard of a steel rolling mill, haven't you?

A. I know just the name steel rolling mill, yes.

Q. You have never been in one?

A. No, I have not.

Q. Did you refer to anyone else to check the prices and specifications of Isaacson and Foundry?

A. I don't believe I did.

Q. Did you discuss the matter with Mr. Vanderbilt? A. I undoubtedly did. [350]

Q. Do you recall what that discussion was specifically?

A. Not specifically, no; just general discussion.

Q. After that conversation with Mr. Murphy and with Isaacson then you were satisfied that the information contained in the quotations from each of those firms was absolutely without fault then, were you? A. Yes.

Q. And at the time of the conversations on May 12th you had in your file the copy of your letter to Mr. Gips advising that the billets will be cast steel from sand molds; is that correct?

A. That is correct.

Q. Now, on direct examination you stated that after you received the teletypes of May 9th regarding the possibility of changing the supplier and requesting that you get an extension of time on the

(Testimony of William H. Schlaugh.)

offers you stated that you were requested to extend "my offers" to Isaacson or Foundry—"my orders" to Isaacson and Foundry. Did you mean that "my" because you had dealt with them exclusively, with Isaacson and Foundry?

A. I don't remember where I used the [351] term "my." Could you refresh me on that?

Q. You used it in connection with stating you were asked by Mr. Gips to obtain an extension of time of the validity of the offers and your answer was, according to my notes, that you were requested to extend "my offers" to Isaacson and Foundry.

A. I didn't mean mine personally. I meant the Grace Seattle office.

Q. But you had been the only one in the Grace Seattle office who had been dealing with Isaacson and Foundry; is that correct? A. Yes.

Q. Concerning those billets?

Now, would you turn to page 43 of your lumber journal for just a moment? I believe you made reference to this this morning in connection with a telephone conversation to Mr. Gips. Now, at the top of page 43 the journal indicates "steel billets, confirm acceptance"? A. Yes.

Q. How do you fix from the journal what date that telephone conversation was on?

A. Well, the last date shown was May 14th and the next May 19th; somewhere in between. I [352] would like to state this: When I received the telephone call I undoubtedly—from Mr. Gips I undoubtedly picked up this book, not knowing it was

(Testimony of William H. Schlaugh.)

the lumber book, and I started to write, "Mr. Gips, steel billets, confirm acceptance." Then in talking to him I realized I had the lumber journal and probably put it down and picked this up and you notice I wrote the exact same information, "steel billets, Mr. Gips, confirm acceptance," and then I went on with the conversation. So that it is my recollection that this telephone call is the same telephone call as this. Do you see what I mean?

Q. Yes, I understand. I am glad you explained that. Then is there any reference to what date that was specifically?

A. Between May 14th and May 16th.

Q. Good. Thank you. It is your recollection that you telephoned Mr. Murphy then to confirm the acceptance of his offer—the Foundry offer?

A. Yes.

Q. And did you fix a date for that telephone conversation?

A. It can be fixed with the documents here, I believe. I feel that I called Mr. Murphy immediately after receiving this telephone call from [353] Mr. Gips.

Q. Handing you Exhibit 18, being a teletype of—is that the record? Does that tend to fix when you called Mr. Murphy?

A. Yes, it does. It fixes the date as of May 15th.

Q. May 15th? A. Yes.

Q. And what is the date or time particularly of that teletype? A. 3:08 p.m., on the 18th.

Q. So that you feel you called Mr. Murphy prior

(Testimony of William H. Schlaugh.)

to sending that teletype? A. I definitely did.

Q. Do you recall anything else in that telephone conversation on May 18th with Mr. Murphy?

A. In my telephone notes it would indicate I talked about other subjects there.

Q. On the 15th.

A. Yes, when San Francisco telephoned me advising that we had the order and I was to place it with Seattle Foundry they also told me that Pittsburgh Testing Laboratory would make the inspection and then when I called Mr. Murphy I gave him that information. Now, I don't know when Pittsburgh [354] Testing Laboratory advised Mr. Murphy that they did not have any spec. but from this book it would appear that I placed the order with Mr. Murphy and then either he contacted Pittsburgh Seattle or then they contacted him and he called me back and mentioned—I have written down here—"Pittsburgh Testing have no spec." It was probably on that same day. I have no way of fixing the day.

Q. You are reading from page 43 of the lumber journal again? A. Yes.

Q. And you say it reads there:

"Jim Murphy. Testing for our account. Pittsburgh Testing have no spec. ASTM 17/29 old testing."

And then it says:

"He'll send us one."

Is that correct?

A. That is what it says, "He'll send us one." I

(Testimony of William H. Schlaugh.)

can't recall whether that meant that he will send us one, meaning Grace. It would be my interpretation at this late date that Pittsburgh, San Francisco, would send Pittsburgh, Seattle. I really don't know.

Q. All right; now, did you have any correspondence or do you recall any correspondence [355] with Seidelhuber after sending out your order? You have testified that your notes show you had a telephone conversation with someone from Seidelhuber?

A. Yes.

Q. And that you passed that information on to Mr. Gips in your letter of May 1st. Do you recall receiving a letter from Seidelhuber?

A. Yes, I do.

Mr. Gantt: This has not been offered in evidence. Do you object to it?

Mr. Morrow: No, no objection.

Q. (By Mr. Gantt): Handing you what is marked Defendant's Exhibit A-4—Defendant's Exhibits A-4—I will ask you if you recall or can identify receiving that letter? A. Yes, I can.

Q. It came to your attention, does it show, in the box up there? A. Yes.

Mr. Gantt: I would like to offer this in evidence, your Honor.

The Court: I understood there was no objection?

Mr. Morrow: No objection. [356]

The Court: Exhibit A-4 may be admitted.

(Defendant's Exhibit A-4 admitted.)

Q. (By Mr. Gantt): Is this the letter then that

(Testimony of William H. Schlaugh.)

you received from Seidelhuber? A. Yes.

Q. Stating that—I wonder if you would read this to us, please; Defendant's Exhibit A-4?

A. "To W. R. Grace and Company, attention Mr. W. H. Schlaugh.

"We received a telephone call from you on or about April 30th regarding the possibility of our supplying a special grade of steel to be used in the manufacture of railroad locomotive parts by a Latin American company. You had requested billets which we are not able to supply and we suggested you contact your client to see if a forging quality ingot would be equally satisfactory. Our standard size ingots were given you over the telephone as follows: 12" square up to 1800 pounds; 20" up to 6600 pounds, and 25" square up to 12,000 pounds.

"We would suggest you or your client [357] provide us with F.A.E. grade of steel which they desire and then we will be able to furnish you with a quotation.

"When we last talked to you we were advised that your company would request this additional information immediately. As we have not heard from you we are writing to inquire if any additional specifications have been received which will aid us in quoting you a competitive price.

"Cordially yours, Seidelhuber Steel Rolling Mill."

Q. In connection with this letter you have the phrase:

"\* \* \* special grade of steel to be used in the

(Testimony of William H. Schlaugh.)

manufacture of railroad locomotive parts by a Latin American Company.”?

A. Yes.

Q. Now, did that concern you at all this request about manufacture of railroad locomotive parts?

A. Well, the original inquiry stated that.

Q. Were you impressed by the phrase here: “\* \* \* special grade of steel \* \* \*” in Seidelhuber’s letter? A. No.

Q. Did you answer Seidelhuber’s letter? [358]

A. Yes, I did.

Mr. Gantt: Any objection?

Mr. Morrow: No.

Q. (By Mr. Gantt): Handing you what has been marked Defendant’s Exhibit A-5, can you identify that as being a copy of——

A. (Interposing): Yes.

Q. (Continuing): a letter you wrote to Seidelhuber? A. Yes.

Q. On May 19th?

A. (Witness nodded in the affirmative.)

Mr. Gantt: I offer this in evidence.

Mr. Morrow: No objection.

The Court: A-5 may be admitted.

(Defendant’s Exhibit A-5 admitted.)

Q. (By Mr. Gantt): Do you ever recall discussing with Mr. Murphy, prior to the claim of the New Zealand Government or you being notified of it, the question of the use of these steel billets in locomotive parts?

(Testimony of William H. Schlaugh.)

A. Only—there was no reference to it—just the only reference was in my original letter, as I [359] recall, stating that they were to be used for locomotive parts.

Q. You don't recall—

A. (Interposing): Other than that, I don't recall any conversation with him on that subject.

Q. Do you recall any discussion with Mr. Murphy prior to the time this claim arose as to what the end use of the billets would be by the New Zealand Government?      A. No.

Q. Do you recall any discussion with anybody at Pittsburgh Testing Laboratory in Seattle concerning the end use of the product by the New Zealand Government?      A. No.

Q. Now, did you ever go out to see the Foundry?

A. Yes, I did.

Q. And when was that visit?

A. It was after Seattle Foundry had commenced manufacturing billets.

Q. Do you have any record of when you went?

A. No, I do not. I know there were fifty to one hundred billets manufactured and already stored across the street at Neider and Marcus upon my first [360] visit there.

Q. There was no reference to your visit in your journal, was there?

A. No just telephone conversations.

Q. And did you see Mr. Murphy there when you arrived, when you went to the Foundry?

A. Yes.



(Testimony of William H. Schlaugh.)

Q. Did you observe the casting operations at the Foundry?

A. He took me through the plant and we just walked through the plant.

Q. Were they pouring any billets then?

A. I believe they were.

Q. Did you watch them? A. Yes.

Q. Now, I believe you testified that you received a letter of May 16th from Mr. Murphy, being Exhibit 23, is that correct? A. Yes.

Q. And you received it on what date?

A. May 19th.

Q. May 19th; and on Exhibit 23 there is a last paragraph. I note the last paragraph says:

“No other requirements were listed, physical or chemical. Will you kindly verify the above.” [361]

There is a cross mark out here, apparently made in ink. Did you make that?

A. I don't recall making it, no.

Q. Now, did you take it upon yourself to show the letter of May 16th to any one at Pittsburgh Testing in Seattle? A. No.

Q. You just sent a copy of it on, as you testified, to Mr. Gips? A. Yes.

Q. You didn't do anything upon receipt of this letter about checking the specifications yourself here locally? A. No, I did not.

Q. Going to the library? A. No.

Q. Now you testified that you sent Plaintiff's Exhibit 24, being a letter of May 19th, down to San Francisco, sending them a copy of the letter Mr.

(Testimony of William H. Schlaugh.)

Murphy wrote of May 16th together with a signed copy of the purchase order. With regard to the fourth paragraph in this letter, quoting therefrom:

“We assume you sold these billets basis the prices quoted by Isaacson Iron Works per our [362] number 3208 or close to them. We later gave you much lower prices from Seattle Foundry, therefore, you should have a handsome margin in this business. Under the circumstances we believe we should participate in a substantial share of the profit instead of the usual one per cent buying commission, and would like to have your confirmation.”

Now, at the time you wrote that letter it was—which was dated May 19th, had you figured out, Mr. Schlaugh, what that additional profit would be?

A. Well, I just roughly compared Isaacson's quotation against Seattle Foundry's quotation.

Q. Had you endeavored to compute the price out to see within a matter of one thousand dollars what the difference in profit would be to Grace?

A. I probably knew within one thousand dollars, yes.

Q. Did you know it was as high as eight thousand dollars difference?

A. No, I didn't know that it was.

Q. In fact, did your Seattle office get to participate in a substantial share of the profits instead of the usual one per cent buying commission?

A. It is not settled yet. [363]

Q. Do you originate any orders up here; purchase materials?

(Testimony of William H. Schlaugh.)

Mr. Morrow: When?

Mr. Gantt: I am asking him.

A. No, we are strictly agents.

Q. (By Mr. Gantt): For San Francisco?

A. Acting as agents for San Francisco in the Northwest area.

Q. I see, and you don't compute the profit margin then, the margin of profit?

A. No, we do not.

Q. But you were aware of it here?

A. I was only aware of the difference in price between Isaacson's quotation and the Seattle Foundry.

Q. Now, Exhibit 36 is the invoices; was payment of these Pittsburgh invoices made in Seattle?

A. No.

Q. Made by the Grace office in San Francisco?

A. Yes.

Q. With regard to the invoice to the Foundry, was payment made in the Seattle office?

A. Yes.

Q. And I see a little box on the left-hand [364] corner of the invoices which are Exhibit 36 which seems to have a date and something else.

A. Yes.

Q. Will you explain what that meant?

A. Yes, that is an audit stamp, an office audit stamp, in which you fill out the date and fill out the account to which this payment would be charged and the amount of money is put down in the right-hand

(Testimony of William H. Schlaugh.)

side and the person that checks the invoice puts his initials here and that is my initial.

Q. I see.

A. And the manager of the office, Mr. Vanderbilt, initials here approving it for payment.

Q. Thank you; now, do you—I believe you stated that Exhibit 20, which is a letter dated May 16th addressed to Seattle Foundry—you believe you dictated that although Mr. Vanderbilt signed it and his initials appear in the lower left hand corner?

A. Yes.

Q. Do you see the reference in there to plant certificates?

“We understand you will furnish a plant certificate that the billets conform to specifications.”

Do you see that portion of Exhibit 20?

A. Yes. [365]

Q. Now, did the Foundry furnish any plant certificates to you or to Grace and Company?

A. I don't believe they did. I don't recall.

Q. You never saw any?

A. Not that I recall.

Q. Was any question ever raised as to why they didn't?

A. No, I don't think there was.

Q. You don't recall ever discussing with Mr. Murphy, “Where are your plant certificates?”

A. No.

Q. Why wasn't that done?

A. In my opinion we did not press this issue with Seattle Foundry inasmuch as we had know

(Testimony of William H. Schlaugh.)

That Pittsburgh Testing Laboratories were furnishing their certificates.

Q. But the letter of May 16th from you to the Foundry requires a certificate.

A. "As I understand, you will furnish a certificate."

Q. And what does the rest of the sentence say?

A. "That the billets conform to specifications."

Q. And the next?

A. "Pittsburgh Testing Laboratory will also inspect these billets the cost of which will be for our account." [366]

Q. So that according to this letter both plant certificates and the inspection of Pittsburgh were requested, is that correct?

A. I believe they were.

Q. Now, handing you what has been marked and what has been admitted in evidence as Plaintiff's Exhibit 35, which purports to be reports of Pittsburgh Testing Laboratory, did you receive any of those reports in the Seattle office?

A. I don't recall that we did.

Q. Have you ever seen them prior to today?

A. Well, I have just seen them on a desk. I haven't read them.

Q. They didn't come to your attention then?

A. No.

Q. Now, did you obtain credit reports on the Foundry? A. Yes.

Q. Where did you—did you do that yourself or

(Testimony of William H. Schlaugh.)

who did look after obtaining a credit report on the Foundry?

A. I believe I asked—either Mr. Vanderbilt or myself asked our accountant at the office to go down to the bank and request Dun and Bradstreet reports. [367]

Q. Did you see the Dun and Bradstreet reports that came as a result of that request? A. Yes.

Mr. Morrow: I think it should be established as to the date. I have no objection. Yes, I object to it. It is immaterial and irrelevant. For what purpose is it offered?

Mr. Gantt: I want to offer, your Honor, the Dun and Bradstreet report which is actually attached to one of Mr. Vanderbilt's letters to Grace in San Francisco. I realize it is a little out of order and if Mr. Vanderbilt is to testify I can do it through him.

The Court: You withdraw your offer?

Mr. Morrow: Well, I have no objection. I don't think it is material or relevant. I think it ought to be established as to the time.

The Court: Are you offering it?

Mr. Gantt: I can't offer it if he is going to object.

The Court: Well—

Mr. Morrow (Interposing): I will withdraw my objection. I may not call Mr. Vanderbilt.

Mr. Gantt: Well, I want to hand—offer this your Honor, which is Exhibit A-13. [368]

The Court: May I see it?

(Testimony of William H. Schlaugh.)

(Whereupon, proposed exhibit was handed to the Court by Mr. Gantt.)

As I understand, there is no objection?

Mr. Morrow: No objection.

The Court: A-13 may be admitted.

(Defendant's Exhibit A-13 admitted.)

Q. (By Mr. Gantt): Exhibit A-13, Mr. Schlaugh, consists of a letter dated June 30, 1952, from Mr. Vanderbilt to Grace in San Francisco?

A. Yes.

Q. And it refers to a Dun and Bradstreet report. I will hand you the exhibit and ask you if you have ever seen the Dun and Bradstreet report which is attached there or a copy of it?

A. Yes I have.

Q. Do you recall seeing the Dun and Bradstreet report at the time of this transaction?

A. Yes.

Q. Now, does this——

Mr. Morrow (Interposing): Now, just a minute. You say “\* \* \* at the time of this transaction.” I would like to have the time established. [369]

Mr. Gantt: That is fair enough. I will do that, Counsel.

Q. (By Mr. Gantt, continuing): This letter is dated June 30, 1952, so that apparently you must have received the Dun and Bradstreet report prior to sending it on June 30th—Grace did?

A. Yes, on or about June 30th.

(Testimony of William H. Schlaugh.)

Q. On or about June 30th; then you had seen this Dun and Bradstreet report attached?

Q. Your answer is "yes"?

A. My answer is "yes."

Q. And did you look it over and study it?

A. Yes.

Q. You did read it?                      A. Yes.

Q. Do you recall reading this portion on page two of the report entitled "Method of operation" down at the bottom, almost at the bottom, of the page, this portion right here?

A. Well, I undoubtedly read all through.

Q. Will you read what is written there in the Dun and Bradstreet report on page two under heading "Method of operation"? [370]

A. "Producer manufactures steel castings to order and does steel foundry work. U. S. Standard Industrial Classification 3323."

Mr. Gantt: Fine. Thank you. [371]

\* \* \*

Mr. Gantt: I will offer Defendant's Exhibit A-15, your Honor.

The Court: A-15 may be admitted.

(Defendant's Exhibit A-15 admitted.)

Q. (By Mr. Gantt, continuing): I want to ask you: Handing you what has been marked Defendant's Exhibit, and admitted as Defendant's Exhibit A-15, I will ask you if you recall having seen that letter?                      A. Yes; I did see it.



(Testimony of William H. Schlaugh.)

Q. How do you—what recalls to you that you saw it? A. My initials are shown up—

Q. (Interposing): In the box?

A. (Continuing): —in the box.

Mr. Gantt: I would like permission to read this into the record, your Honor.

The Court: You may proceed. [372]

\* \* \*

Q. (By Mr. Gantt): Now, I want to ask you, Mr. Schlaugh, you stated you read this letter and your stamp is shown as of July 15th. I want to ask you if you did keep in constant contact with Seattle Foundry to see that the contract had been completed in accordance with the original delivery date and specifications?

A. We kept in constant contact with Seattle Foundry regarding delivery dates making sure that they delivered the billets on time as per the contract and inasmuch as Pittsburgh Testing Laboratory had been hired to make the inspection we felt that it was in good hands and that their inspection would prove that the order was manufactured as per contract.

Q. I want to ask you whether you ever discussed the contents of this letter with anyone at Pittsburgh Laboratory in Seattle?

A. No; I don't recall that I did. [374]

\* \* \*

Mr. Gantt: I am offering Defendant's Exhibit

(Testimony of William H. Schlaugh.)

A-19, your Honor, I understand Counsel has no objection.

The Court: No objection?

Mr. Morrow: No objection.

The Court: A-19 may be admitted.

(Defendant's Exhibit A-19 admitted.)

Q. (By Mr. Gantt): Handing you, Mr. Schlaugh, Defendant's Exhibit A-19, apparently a signed copy of the letter from Pittsburgh Testing Laboratory dated August 28, 1952, to W. R. Grace and Company, 408 White Building, Seattle, signed by M. E. Johnson, Pittsburgh Testing Laboratory and it is addressed to Mr. Vanderbilt, I wonder if you can tell me whether you recall seeing the original of that letter? Mr. Morrow says you don't have it in your files.

Mr. Morrow: We were never asked to produce the original of this letter.

Mr. Gantt: That may be, your Honor.

Mr. Morrow: If you want the original I will try and get it.

A. I think we probably have the original in the Seattle office. [375]

Q. (By Mr. Gantt): Do you recall the letter?

Mr. Morrow: We are agreeable that this stand in place of the original.

Mr. Gantt: Fine.

The Court: There is no question raised as to where the original is?

(Testimony of William H. Schlaugh.)

Mr. Gantt: Oh, no; no.

A. I must have seen this. I don't recall it. It has been so long ago; but I undoubtedly saw it.

Q. (By Mr. Gantt): Would it come to your attention in the course of this transaction?

A. Yes.

Q. I see it is addressed to Mr. Vanderbilt, but you were really looking after the transaction in Seattle, weren't you?

A. This letter wasn't brought up at all in the case, and I think I can give you an explanation why.

Q. I think you could do that on cross-examination. You can state, though, that you are familiar with the letter, and have seen it?

A. To tell you the truth, I really don't recall seeing it. I must have.

The Court: You haven't any present [376] recollection?

The Witness: No; but undoubtedly, if we produce the original, it will have my initials on it.

Q. (By Mr. Gantt): I am not trying to trap you in that regard.

A. I probably saw it.

Q. I want to read you the first sentence of Mr. Johnson's letter, August 28, 1952. That was prior to the time all the billets were shipped?

A. I think this had to do with the last shipment.

Q. This had to do with the last shipment?

A. Yes.

Q. And the first sentence is:

(Testimony of William H. Schlaugh.)

“Attention Mr. Vanderbilt:

“Gentlemen:

“In compliance with your telephone request of August 25, 1952, we hereby submit our certification of the following weights on Grade 1, three inches by six inches by ten feet zero inches, steel billets cast by the Seattle Foundry Company, Inc., of Seattle, Washington.”

You think, then, you have seen this letter, and have read it?

A. Not any more than I did before.

Mr. Gantt: All right; no further questions. [377]

Mr. Morrow: I would like to finish with Mr. Schlaugh. I think I have a few questions.

The Court: You would like to finish now?

Mr. Morrow: Yes.

The Court: All right.

### Redirect Examination

By Mr. Morrow:

Q. Mr. Schlaugh, in reference to the Dun and Bradstreet report, as I recall your testimony, you stated that came in after the job had started.

Now, what was the purpose of obtaining that report?

A. We obtained the report because Seattle Foundry had requested an advance after producing so many billets. They wanted an advance of money.

Q. Was the purpose of it for credit purposes?

(Testimony of William H. Schlaugh.)

A. Yes, definitely; just for credit.

Q. Will you state whether or not it was for purposes of determining whether Seattle Foundry was producing the product that complied with the specific order?      A. No; not at all.

Q. Now, during the period between the time of the original inquiry for billets for New Zealand—that is, some time in April, 1952, and the time when the New Zealand [378] claim came to your attention, some time in May or June, 1953, did you at any time know or have any knowledge that the material sold to you by Seattle Foundry would not comply or did not comply with the specification ASTM A-17/29?      A. No.

Q. Were you aware that there was a distinction between casting and forging?      A. No.

Q. Were you aware that the specifications required steel billets which were of a semi-finished forged material?      A. No.

Q. Were you aware of anything which would lead you to believe that Seattle Foundry was not producing a product which conformed to the request by the New Zealand government?      A. No.

Mr. Morrow: That is all.

The Court: Mr. Savage, do you have any questions at all of this witness at this time?

Mr. Savage: I think we will waive any cross-examination. [379]

(Testimony of William H. Schlaugh.)

Recross-Examination

By Mr. Gantt:

Q. But you did write the letter, Exhibit 9, to Mr. Gips, in which you stated that these billets are cast steel from sand molds? A. I wrote that letter.

Q. With reference to the quotation by the Seattle Foundry to fill this order?

A. I wrote that letter; yes.

Q. You knew then that the billets that the Foundry was going to furnish were cast steel from sand molds? A. They stated that they were.

Mr. Gantt: That is all.

A. (Continuing): And I will qualify it by saying even though they stated it, I still felt we were getting billets per specification 1729, no matter how they manufactured them.

Mr. Gantt: I will object to the last portion of the answer as not responsive, your Honor.

The Court: It may be argumentative. I don't know that it should be stricken.

There is one question I was going to ask you in regard to Exhibit No. 20.

As I recall, Mr. Schlaugh, this was, you said, prepared by you, but for the initials of—— [380] your request was prepared by you but signed by Mr. Vanderbilt?

The Witness: Yes.

The Court: Was that mailed or delivered, do you know?

(Testimony of William H. Schlaugh.)

The Witness: Mailed on May 16th.

The Court: Mailed on May 16th?

The Witness: The date it was written.

The Court: Do you know when it was received back?

The Witness: The closest date I can tell on that is the covering letter. No; we didn't send them a covering letter on that. I can't tell.

The Court: May 16th; it was sent to them on the 16th?

The Witness: Yes.

The Court: You can gather that from the date on it?

The Witness: Yes. I purchased by telephone on the 15th, and this letter is on the 16th, saying. "We confirm telephone conversation yesterday." I mailed it on the 16th, but cannot establish when it was returned.

The Court: Do you have any present recollection of mailing it, or do you assume it was mailed? [381]

The Witness: I assume it was mailed. The mail girl puts the mail out. I didn't personally mail the letter.

The Court: You have no present recollection of the exhibit, other than preparing it?

The Witness: I checked it over. I am sure—if I dictated it—I feel now definitely I did—then I checked it over to see if it was typed correctly, and then I showed it to Mr. Vanderbilt for signature. That is my recollection of what happened.

The Court: But you don't know whether it was

(Testimony of William H. Schlaugh.)

mailed, or when it was received, or when Mr. Murphy signed it?

The Witness: No; I do not.

The Court: You have no present knowledge of it?

The Witness: No.

The Court: That is all.

Mr. Morrow: That is all.

The Court: Unless there are some questions on my questions.

Mr. Morrow: Well, no; there isn't, your Honor.

I would like to explain that at the request of Mr. Gantt the original was attached to the copy of [382] that, the exhibit, the yellow copy is the office copy of the Grace and Company, which was returned or signed by Mr. Murphy, and in the office of Grace Company, and the original came from the files of Seattle Foundry, which is attached.

The Court: I was just inquiring as to his present recollection of the signed copy which would be the Grace and Company copy.

The Witness: No; I don't recall.

The Court: That is all. That is all, then, Mr. Schlaugh. [383]

\* \* \*



RICHARD HARGOS

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your name and spell your last name, please?

The Witness: Richard Hargos—H-a-r-g-o-s (spelling).

Direct Examination

By Mr. Morrow:

Q. Mr. Hargos, will you please state your full name? A. Richard Hargos.

Q. What is your address?

A. 242 Lake Street South, Kirkland.

Q. And what is your occupation?

A. Jobbing Sales Manager.

Q. For whom do you work?

A. Isaacson Iron Works.

Q. How long have you been employed by Isaacson Iron Works? A. Almost 20 years.

Q. And in what capacity did you start out with them? A. As a draftsman.

Q. How long were you a draftsman?

A. About five years. [385]

Mr. Gantt: Excuse me just one minute, your Honor. I wonder if he could speak a little louder?

The Witness: About five years.

Q. (By Mr. Morrow): And what was your next job? A. In charge of heat treating.

Q. How long were you in charge of heat treating?

(Testimony of Richard Hargos.)

A. During the war years, about four years.

Q. And what does the heat treating department involve?

A. Oh, reheating the steel after forging operations to refine the grain structure and to increase the physical properties.

Q. What was the job you had after that with Isaacson's?      A. The job in——

Q. (Interposing): After your heat treating job?

A. The same job I have now.

Q. And how long have you had this job?

A. I would say about since 1946.

Q. What is the nature of the business of the Isaacson Iron Works?

A. Well, we are a forging organization, making forgings and billets, and also steel fabricating and galvanizing.

Q. What is the——

Mr. Morrow: Strike that. [386]

Q. (By Mr. Morrow, continuing): What are your present duties in connection with their business?

A. Handling the sales or inquiries for particular forgings and billets and machining work.

Q. In your duties as manager of the—what is it—sales department?

A. It is the jobbing sales department.

Q. The jobbing sales department; what particular knowledge and experience do you have in handling of those duties? By that I mean, what par-

(Testimony of Richard Hargos.)

ticular items come up, of which you have knowledge in this jobbing sales management?

A. Well, I have to have an understanding of engineering problems as well as metallurgical problems of the conditions involved, how a product can be made, what is involved in making them, and a good idea of how much time it takes, so that I can properly cost a job, and, therefore, establish a selling price.

Q. Do you have any experience or knowledge in the actual manufacture of the steel products at Isaacson Iron Works? A. By observation; yes.

Q. And what products do Isaacson Iron Works manufacture?

A. They manufacture ingots and billets, forgings, and [387] steel fabrication—that is, bridges and buildings and plate work such as road equipment work and hot-dip galvanizing.

Q. Does your experience and your knowledge involve the details of the manufacture of items such as ingots and billets? A. Yes, sir.

Q. Now, in respect to your knowledge of costs going to make the finished product, does your knowledge and experience of costs include the knowledge of costs of such items as scrap steel?

A. Yes, sir.

Q. Now, I have referred to your general knowledge. Did you have this knowledge and experience in 1952? A. Yes, sir.

Q. Now, what was your job in 1952, by the way?

A. The same as I have now. [388]

(Testimony of Richard Hargos.)

Q. Are you familiar with the American Society of Testing Materials? A. Yes; I am.

Q. Are you a member? A. Yes.

Q. What is the American Society of Testing Materials?

A. It is a Society for setting up standards for manufacturing of many numerous products besides even steel. Steel is one of the main items that they take care of. [411]

Q. And you say that you say it is for setting up standards; is that standards of specifications so that the product—the finished product—will comply with the requirements, say, of an order? A. Yes.

Q. By whom and by what industry and commerce and professional men is the American Society for Testing Materials specifications used?

A. Well, by engineers and steel mills and forging organizations, and all branches of the industry, almost.

Q. Is it used by customers and persons who desire to use products which conform to a certain standard of specifications? A. Yes.

Q. And it is used by them in purchasing and ordering a certain product conforming to specifications? A. Yes.

Q. And does the Society and its specifications and standards afford to manufacturers and purchasers alike a standard product upon which both can be assured, if it lives up to the specifications that the product will be as ordered?

A. Yes.

(Testimony of Richard Hargos.)

Q. And is the American Society for Testing Materials also used by professional engineering firms [412] engaged in the inspection business?

A. Yes.

Q. And do they likewise use the standards to determine on behalf of either the manufacturer or the purchaser whether or not the product conforms with the specifications? A. Yes.

Q. Referring you to what has been admitted in evidence as Plaintiff's Exhibit No. 41, Mr. Hargos, and which is identified as the standard specifications for carbon steel and alloy steel blooms, billets and slabs, and forgings, admitted in evidence as an identical copy, or photographic copy, of such standards, I would like to ask you whether you are familiar with these particular standards, or, more particularly, have you familiarized yourself with those particular standards? A. Yes.

Q. By the way, in the—when you receive a request to manufacture a product in accordance with a certain ASTM specification, is reference usually made to the actual specification? A. Yes.

Q. I would like to refer you to what has been marked Plaintiff's Exhibit No. 30—no; wait a minute—No. 56—which is the original volume from which your [413] exhibits, Plaintiff's Exhibit No. 41, has been photographed, and ask you if you can identify this exhibit—that is, Plaintiff's Exhibit No. 56—as a publication of the American Society for Testing Materials, issued in, or published in 1930, and containing these particular specifications?

(Testimony of Richard Hargos.)

A. Yes.

Mr. Morrow: I would also like to offer at this time Plaintiff's Exhibit No. 56. There is some duplication, but I would like to offer it and have it in evidence for the purpose of showing the very publication. It is in book form.

Mr. Gantt: We have no objection to it, your Honor.

The Court: It may be admitted.

(Plaintiff's Exhibit No. 56 admitted.)

Mr. Morrow: Very well.

Mr. Gantt: Can I have just one look at it?

Mr. Morrow: Surely.

(Whereupon, there was a brief pause.)

Q. (By Mr. Morrow): Now, Mr. Hargos——

The Court: (Interposing): That is a 1930 volume; is that right? [414]

Mr. Morrow: It is a 1930 yearbook.

The Court: I am just checking with the list of exhibits, is all.

Mr. Morrow: Plaintiff's Exhibit No. 56.

The Court: It states here, 1930.

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Now, Mr. Hargos, I first would like to ask you that, had you received the order of the Grace and Company, pursuant to your proposal marked Plaintiff's Exhibit No. 6, could the Isaacson Iron Works, and would the Isaacson Iron

(Testimony of Richard Hargos.)

Works have been capable of manufacturing a product conforming strictly to these specifications?

A. Yes.

Q. And referring you to the ASTM specification A-17/29, which is Exhibit Number——

A. (Interposing): 41.

Q. (Continuing): ——41, which you have before you, would the product thus produced be a semi-finished, rolled or forged material, as provided in paragraph III of the specifications?

A. Yes.

Q. Now, with reference to that specification, paragraph III, "Billet shall be purchased as a semi-finished rolled or forged material," what does the term [415] "semi-finished rolled or forged material" mean; or terms, I should say?

A. It means that the billet will be used for—to make something further, for either forging or machining.

Q. Is there an implication in that specification that the billet itself is to be further refined?

A. Yes; I would say so.

Q. Would you or a professional engineer dealing in steel products be put on notice that the billet—assuming that it is as in your proposal—would you be put on notice that the product was to be used in making some other product?

A. I don't know what you mean by "put on notice."

Q. What I mean is, referring now to your par-

(Testimony of Richard Hargos.)

particular specification, ASTM A-17/29, and the particular size as called for in Plaintiff's Exhibit No. 6?

A. Yes?

Q. Would you—you naturally wouldn't know the end product of the billet? A. That is right?

Q. But would you or would you not anticipate that this material was to be used—not to be used but to be further refined or forged, or some other thing done to it, some other further process of manufacture, in order to give it an end use? [416]

A. Well, we would assume that.

Q. Now, why would you assume that?

A. By common practice.

Q. Now, would you assume it because of this particular paragraph III, or because of the general specification that it is for carbon steel and alloy steel blooms and slabs or forgings, or what would be the basis of your assumption?

A. By being familiar with the steel industry in general, when a person orders a billet, it is his intention that with his own equipment he will finish the work on it.

Q. I see. Going to paragraph V of the specification, wherein it is provided that "a sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation," what has that specification to do with it?

A. That refers to this cropping that I mentioned.

Q. I see. And what is "piping" and "undue segregation"?

A. Well, piping is when the ingot has formed a



(Testimony of Richard Hargos.)

cavity down through the center of it. It may extend one-third of the way down, or only one inch, or two, down; but in a bad ingot it might extend all the way down; and segregation is where the steel is not homogeneous. It has inclusions, such as non-metallic inclusions, or gasholes. [417]

Q. And if the ingot was not free of injurious piping and undue segregation, would that be reason for rejection under these specifications?

A. Yes.

Q. Now, in reference to paragraph VI in which it is provided that, "unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet"—is that a specification which would be essential to the process of manufacture of steel billets such as described in your order, Plaintiff's Exhibit No. 6?

A. Yes.

The Court: What was that question, Mr. Reporter?

(Whereupon, the following was read by the reporter:)

"Q. Now, in reference to paragraph VI in which it is provided that, 'unless otherwise specified, the billets shall be made from ingots of at least three times the cross-sectional area of the billet'—is that a specification which would be essential to the process of manufacture of steel billets such as described in your order, Plaintiff's Exhibit No. 6?

"A. Yes." [418]

(Testimony of Richard Hargos.)

Q. (By Mr. Morrow): And in your opinion if the billet in question—assume the manufacture under your order—were not manufactured from ingots of at least three times the cross-sectional area of the billets, would that be a non-compliance with the specification? A. Correct.

Q. Now, referring you to paragraph X—paragraph 10(a) of the ASTM specification, which appears in my Plaintiff's Exhibit No. 56, on page 176, and which you have before you in Exhibit—

The Court: 41?

The Witness: 41.

Q. (By Mr. Morrow, continuing): —41, I would like to ask you, Mr. Hargos, what stage of the manufacture does the paragraph in reference to chipping refer to? A. The final stage.

Q. Now, in the term "billet," as used therein, could that be interpreted to mean the stage of the ingot process? A. No.

Q. Would you say, Mr. Hargos, that paragraph 10(a) in reference to workmanship and finish pertains only to the final stage of manufacture, and has no reference at all [419] to the casting stage of the process of manufacture? A. That is right.

Q. In other words, that paragraph 10(a) has no reference to chipping of the castings?

A. That is right.

Q. And the matter of discard, however, appearing in paragraph 5 of the specifications has to do with the ingot stage of the manufacture; has it not?

A. Yes; it does, as worded here; but in our

(Testimony of Richard Hargos.)

method of manufacturing we hold it until we—until it is actually a billet because it is easier for us to do it that way.

Q. Is it—in your method of manufacture, do you do the forging first?

A. We have to have something to hang on to, and we use the hot top as the method of holding on to the piece.

Q. Is there any difference in the final effect?

A. No; none whatsoever.

Q. In reference to paragraph 11, “The billets shall be free from injurious defects and shall have a workmanlike finish,” what defects are referred to therein?

A. Well, that would be—injurious defects would be a pipe condition, segregation, so that the steel is [420] not homogeneous. Well, it just isn't good material.

Q. If the finished product contains porosity and blowholes, would they be in violation of paragraph 11, providing that the billets shall be free from injurious defects, and shall have a workmanlike finish?

A. Blowholes would be in violation; yes.

Q. Suppose there was sand adhering to the sides of the billet, would that likewise be a violation of the specification?

A. It is impossible for sand to adhere to a billet unless it has been laid in sand after it was forged.

Q. Are you familiar with the process of—

Mr. Morrow: Well, strike that.

(Testimony of Richard Hargos.)

Q. (By Mr. Morrow, continuing): Is there any—have you ever heard of the term “cast steel billet”?

A. No.

Q. You have never heard of the term?

A. It is an erroneous—it is a misnomer. There is no such thing as a “cast steel billet.”

Q. There is no such thing in the industry as a cast steel billet?

A. No.

Q. Why is that?

A. A billet is a casting of a—a cast ingot [421] that has been worked, and it doesn't become a billet until it has been worked.

Q. In other words, the term “billet,” to you at least, and to the industry, means that it is a worked material which has been forged or rolled?

A. That is correct.

Q. Now, assuming, Mr. Hargos, that in the manufacture of this product as called for in the specifications as set forth in your proposal, being Plaintiff's Exhibit No. 6, that the molten metal was poured in sand molds at a foundry; would the product manufactured comply with the specifications set forth in your proposal?

A. No.

Q. And why not?

A. Because in a foundry they don't do any mechanical work on the casting.

Q. What would be the nature of the material which you would produce by a sand-casting method?

A. Well, it would be the same nature as the ingot. It would be large grained.

(Testimony of Richard Hargos.)

Q. Would the material produced be a forging quality ingot—thus produced, I should say?

A. It could be.

Q. It could be?

A. It could be made that way; yes. [422]

Q. I see.           A. But not economically.

Q. To your knowledge, are any forging quality ingots made by foundries using a method of pouring steel into cast sand molds?           A. No.

Q. Is it being done?           A. No.

Q. Has it been done, to your knowledge?

A. The only time it has ever been done is when the ingot required is so large that there is not an ingot mold big enough to pour it into.

Q. Yes.

A. And that is the only reason that is ever done.

Q. And in that instance do you still stick to the terminology of its being either an ingot or a casting?

A. Yes.

Q. As distinguished from a billet which is a semi-finished forged or rolled material; is that correct?           A. Yes.

Q. Mr. Hargos, I want to hand you the original inquiry which you—which is in evidence—that is, a copy of it is in evidence—I can't hand you the one you received, but this which I am showing you, which is an enclosure attached to Plaintiff's Exhibit No. 4, is a [423] copy of the specifications which were put out to Isaacson and others, according to the testimony in this case, and I ask you to examine the same, particularly with reference to the term "near-

(Testimony of Richard Hargos.)

est equivalent," and when you have done so I would like to ask you a question.

A. I am familiar with this.

Q. You are familiar with that, are you?

A. Yes, sir.

Q. Now, what does the term "nearest equivalent"—first, I will ask you if you know what is meant by the term, "nearest equivalent"?

A. Nearest equivalent, basically, means something as close to what is required as possible. In this particular instance it means the chemistry.

Q. In other words, the terms as used there, "Type A, Grade 2, or nearest equivalent," refers to the chemistry composition of the material?

A. Only.

Q. Only. Now, can you state in reference to my questions and the assumed manufacture of the material at a foundry, and your statement that it is possible to manufacture an ingot by pouring the same in sand molds, can you state what additional step would be required in order to produce a forging quality ingot—

Mr. Morrow: Strike that. [424]

Q. (By Mr. Morrow, continuing): To produce a billet?

The Court: Do you understand the question?

The witness: Yes; I do.

A. The casting as cast by the foundry would have to be worked under a press or under rolls in a rolling mill.

Q. (By Mr. Morrow): In other words, to pro-

(Testimony of Richard Hargos.)

duce a product which would comply with the specifications it would be necessary for the foundry to employ a method of rolling or forging, or for somebody else to do so in order to produce a billet; is that correct?      A. Correct. [425]

\* \* \*

Q. Do foundries ordinarily make forging quality ingots, Mr. Hargos?      A. No.

Q. What further steps would be necessary for them to make forging quality ingots?

A. The average foundry has an acid furnace and it is desirous for forging quality to have a basic-type furnace and use a double-slag method of manufacturing.

Q. Is it possible to make a forging quality ingot by pouring steel flat in sand molds?

A. I wouldn't think so.

Q. Why not?

A. Because your impurities would be all on one side of the ingot, and not at the top.

Q. And what problem would you have, then, in connection with discard?

A. Well, you wouldn't even get that far. It would crumble on the dies. [426]

\* \* \*

Q. (By Mr. Morrow): Mr. Hargos, please assume the following hypothetical facts:

750—that is referring to the quantity—of sound castings weighing approximately 540 pounds each, or a total of 404,795 pounds, being 180.5 gross tons,

(Testimony of Richard Hargos.)

located at Seattle, Washington, in August, 1952, and that the size of the castings are 91½ inches by 4 inches by 4 feet one-half inch; assume that the castings have been manufactured by a foundry by a process of pouring the steel in flat sand molds.

Are you able to state to what use or uses such material could be put?

A. In my opinion, of no use.

Mr. Gantt: Objection, your Honor, as not responsive.

Q. (By Mr. Morrow): You can answer the first part of the question "yes" or "no."

A. No; of no use.

Q. Well, are you able to state? The question is, are you able to state? A. Oh.

Q. Whether or not said material can be put to some use? [439]

The Court: The question is: Can you so state?

A. Yes.

Q. (By Mr. Morrow): And what use or uses could said material be put to? A. Scrap.

Q. Now, when you say "scrap," what do you mean? A. For remelting purposes.

Q. In other words, in your opinion the only use that said material could be put to would be for scrap metal for remelting purposes only?

A. Economically; yes.

Q. Now, would it have any value for use other than scrap, in your opinion? A. No.

Q. Mr. Hargos, are you familiar with the value



(Testimony of Richard Hargos.)

of scrap metal in August, 1952, in Seattle, Washington?      A. Yes.

Q. What, in your opinion, would be the value of said material, which I have described in the hypothetical question in Seattle in August, 1952?

A. About \$40 a gross ton.

Q. By the way, in dealing in scrap, during that period did the—did you deal in gross tons or net tons?      A. Gross tons. [440]

Q. Is that customary?      A. Yes.

Q. Now, Mr. Hargos, assume that the foregoing facts that I have stated with respect to the 750 sound castings of dimensions  $9\frac{1}{2}$  inches by 4 inches by four feet one-half inch are existent except that there are 54 castings at Seattle, Washington, in August, 1952, of the following dimensions: 6 inches by 3 inches by 10 feet, weighing approximately 610 pounds each, totaling 33,465 pounds or 14.9 gross tons.

Can you state—are you able to state—whether or not said material would be of any use?

A. Yes.

Q. And of what use would said material be?

A. Also scrap.

Q. Would said material be of any value for other than scrap purposes?      A. No.

Q. What, in your opinion, would be the value of said material at Seattle in August, 1952—that is, the 54 castings, 6 inches by 3 inches by 10 feet, as described in the hypothetical facts?

A. Also \$40 a gross ton.

(Testimony of Richard Hargos.)

Q. Now, in respect to your answer to the hypothetical questions in connection with the 750 castings and [441] and the 54 castings, would it make any difference in your answers if the chemical composition of the material conformed to Type A, Grade 2, as set forth in the ASTM A-17/29 specifications?

A. No.

Q. Would it make any difference if the chemical composition conformed to Type A, Grade 1, of the specifications? A. No.

Q. Would it make any difference in your answers if the steel was kilned, or semi-kilned steel?

A. No.

Q. Would it make any difference in your answers if the risers and the gates of the sand molds—would it make any difference in where the risers or gates of the sand molds were placed?

A. No.

Q. Would it make any difference in your answers if in the process of manufacture the molds were slightly tilted for the purpose of pouring?

A. No.

Q. Now, in reference to Plaintiff's Exhibit No. 6—you have that in mind—that was the Isaacson quotation? A. Yes.

Q. Will you state, Mr. Hargos, whether the [442] Isaacson Iron Works could have filled an order placed by Grace, or anyone else, upon the basis of the price quoted in your proposal and during the period from June through October, 1952?

A. Yes.

(Testimony of Richard Hargos.)

Q. And would they have been glad to have done so?  
A. Yes.

Q. I may have asked you, but I don't want to overlook this question:

Would a forging quality ingot pass for a billet?

A. No.

Q. And how does the Isaacson Iron Works compare in size and production to other steel producers, so far as production of forging quality steel is concerned in the Northwest?

A. We are the largest.

Q. And how do they compare in those respects on the Pacific Coast?  
A. We are the largest.

Mr. Morrow: That is all.

#### Cross-Examination

By Mr. Gantt:

Q. Mr. Hargos, do you know whether the product here or the castings here were actually used after shipping? [443]

The Court: I didn't understand.

Mr. Gantt: I asked him, your Honor, if he knew whether the product here was actually used.

A. No; I don't.

Q. (By Mr. Gantt): Were those actually used?

A. No; I don't know.

Q. Do you know the intended purpose?

A. No; I don't.

Mr. Gantt: Now, if the Court please, we had subpoenaed Mr. Hargos also on another point.

(Testimony of Richard Hargos.)

The Court: You have what?

Mr. Gantt: The defendant, Pittsburgh, had subpoenaed Mr. Hargos on another point, and if counsel doesn't object, if we can make use of Mr. Hargos while he is here without having to call him back again——

Mr. Morrow (Interposing): I have no objection.

Mr. Gantt (Continuing): ——I want to talk to him with reference to his putting in the bid on behalf of Isaacson.

The Court: Are you going into that separate from your cross-examination?

Mr. Gantt: Well, if it is all right, I will just do it in this manner.

Mr. Morrow: I have no objection. I think [444] in respect to those matters they should be considered as direct examination.

The Court: Well, it probably only goes to the form of the question, is all.

Mr. Gantt: I think that is all it would go to.

Mr. Morrow: I have no objection.

The Court: All right.

Q. (By Mr. Gantt): Mr. Hargos, you stated you were the jobbing—sales jobbing manager?

You were the sales jobbing manager at Isaacson in 1952? A. Yes.

Q. And in that capacity, did you have occasion to prepare the bid which is plaintiff's Exhibit 6?

A. Yes.

Q. And was that in answer to an inquiry that

(Testimony of Richard Hargos.)

you received, handing you a portion of Exhibit No. 3, a copy of a letter dated April 23, 1953?

A. Yes.

Q. Now, you are referring to, are you, your own copy of that letter, or the original of that letter?

A. It is a duplicate of what is the court exhibit.

Q. And it was in answer to that that you submitted the proposal which is Plaintiff's Exhibit 6?

A. That is right. [445]

Q. Now, what did you do upon receipt of Exhibit 3, the inquiry; what steps did you carry out in the making out of your proposal?

A. My first step was to find out what the specifications called for, in pencil alongside of the dittoed copy which was attached to that letter that you showed me.

Q. The dittoed copy is the specifications?

A. Yes. I have written in pencil what the chemistry was that was required on both types and grades in the inquiry. That is items 1 and 2. From that I was able to determine what my cost would be and what our selling price should be.

Q. What did you then do? Did you compute—did you prepare an estimate sheet?

A. I have, just our regular form which the customer does not get, which is part of our own file on how I worked it up.

Q. May I see that, please? A. Yes.

Q. As a result of your estimate sheet, what price did you work out per net ton for the two items?

(Testimony of Richard Hargos.)

A. For the 750 billets it was \$156.50 a net ton; and for the second item \$177.50 per net ton.

Q. Now, are you aware of the steel supply situation in the Northwest in 1952, in April and [446] May? A. Yes.

Q. What was the condition of the steel market?

A. It was very tight.

Q. What do you mean by that?

A. Steel was hard to get.

Q. Were you familiar with other steel firms in Seattle in 1952, in April and May? A. Yes.

Q. And were you familiar—did you have occasion to deal in steel? That is, did you buy and sell steel?

A. No; not their products—not their products.

Q. Did you have occasion to buy and sell any steel during this period of time?

A. No; that doesn't fall in my classification, that isn't my job.

Q. Were you familiar with the prices charged by other mills? A. Oh, yes.

Q. Is that part of your job? A. Oh, yes.

Q. Why?

A. Because we, in a sense, have to be competitive or we don't get the business.

Q. And you prepared the proposal and submitted it to Grace and Company? [447] A. Yes.

Q. And in your opinion are the prices quoted there reasonable prices for this item of 750 steel billets and 50 steel billets?

A. As manufactured by a forging shop; yes.

(Testimony of Richard Hargos.)

Q. Those are competitive, reasonable prices?

A. They are not as low as a mill would be, but they are as low as a forging shop would be, which we are.

Q. What was the steel supply and market in steel rolling mills?

A. They had large backlogs.

Q. In 1952 in April and May? A. Yes.

Q. Were there any steel rolling mills in Seattle at that time? A. There were two.

Q. What were those?

A. Northwest Steel Rolling Mill and Bethlehem.

Q. Were they both operating at that time, so far as you know? A. Yes; they were.

Q. Do you recall any telephone conversation with anyone at Grace and Company?

A. Well, I must have talked to someone. I have a note written in pencil on the face of my copy, on May 12th, [448] where I probably requested to find out if the inquiry was still active, and that I was told at that time that I was about \$30 high per ton.

Q. Did you have occasion to discuss the product which you were to supply at that time?

A. Well, I have no recollection. I doubt if it would enter my mind, that something else had been proposed.

Q. You were told that your price was \$30 high?

A. Yes.

Q. You were told that by someone from Grace?

A. Well, I assumed that. That is from information I have written here.

(Testimony of Richard Hargos.)

Q. That was on a telephone call? A. Yes.

Q. On May 12? A. Yes.

Q. Were you told who the other supplier was whose price was \$30 lower? A. No.

Q. Did you inquire?

A. It is nice to know who your competitor is, but I probably didn't; no. At least, I have no recollection of knowing who the supplier was.

Q. Now, Mr. Hargos—

A. (Interposing): I might say this, that I [449] probably assumed it was out of the area, because I knew that the mills were so tight and unable to meet the delivery requirements that I probably assumed it was in some other part of the United States that the lower bidder supplied.

Q. You said the mills—now, you mean rolling mills? A. Yes; rolling mills; that is right.

Q. They were not taking jobs of this kind?

A. No; they were taking care of their own customers. They had enough trouble even supplying them partially.

Q. Now, I believe on your direct examination Mr. Morrow gave you the—referred to 180.5 gross tons.

I wonder if you can compute for us, or have you computed for us, the value—or, rather, the total price which Isaacson would have received based on the tonnage prices that you quoted?

A. Well, I have a figure here for both items.

Q. Is that a total figure? A. Yes.

Q. What is that total figure?



(Testimony of Richard Hargos.)

A. \$33,268.75.

Q. Now, that figure you arrived at in what manner?

A. By taking the theoretical weight of each billet and dividing it by 2,000 pounds to get the net tons involved, [450] and then multiplying by the various factors as to the various prices that I had quoted.

Q. Now, if in fact the product weighed—the total weight of item 1, the 750 steel billets, weighed 180.5 gross tons, to arrive at your price for that you then multiply 180.5 by \$156.50; is that correct?

A. No; your gross tons are larger, has heavier weight by 240 pounds, than a net ton. A net ton is 2,000 pounds and a gross ton is 2,240 pounds.

Q. Then 180.5 gross tons is how many net tons—can you tell us?

A. Yes; just a moment. Very close to—wait a minute; I beg your pardon—203, approximately, net tons.

Q. 203 net tons?           A. Yes.

Q. Now, if there were—if the billets which you produced had weighed 203 net tons, at your price of \$156.50 per net ton for the 750 items, what would that work out; what would be the price of the 750 billet items?

A. Well, that of course, works out to \$33,400.

Q. \$33,400?           A. Yes.

Q. Now, if the weight of the smaller item, item 2, the 50 steel billets, was 14.9 gross tons, Mr. Hargos, [451] how many net tons would that be?

A. That would amount to 16.7 net tons.

(Testimony of Richard Hargos.)

Q. And in order—if the billets—if the small item 2, the 50 steel billets, had weighed 16.7 net tons, at your price of \$177.50 per net ton, what would the price of your item 2 have been?

A. \$2,910.

Q. \$2,910?           A. Yes.

Q. I believe you stated that the prices you quoted in your proposal, in Exhibit 6, would be competitive with what other producers would charge in a forging shop?

A. A forge shop, yes; that is correct.

Q. Did you make any sales or purchases in August or September or October—well, did you make——

Mr. Gantt: Strike that.

Q. (By Mr. Gant, continuing): Did you make any sales or purchases of scrap metal in August of 1952?           A. Oh, yes.

Q. You did personally?

A. Not personally; no.

Q. But you were aware——

A. (Interposing): The company did.

Q. The company did? [452]           A. Yes.

Q. And you have checked those prices, have you?

A. Yes, sir.

Q. And that is the \$40 you gave us a minute ago?

A. That is an average figure; yes, sir.

Q. For the Seattle area?           A. Yes, sir.

Mr. Gantt: I have no further questions, your Honor.

(Testimony of Richard Hargos.)

Mr. Morrow: I assume I am permitted to ask leading questions with respect to matters gone into?

The Court: On direct, yes; having to do essentially with the quotation.

Mr. Morrow: Well, it has to do with the conversation with Mr. Schlaugh, which I didn't go into.

### Redirect Examination

By Mr. Morrow:

Q. Mr. Hargos, you recall I asked you to check your notes to see whether you had any conversation with Mr. Schlaugh when I visited you at Isaacson Iron Works last week? A. Yes.

Q. And you did so; didn't you? A. Yes.

Q. And your notes showed no information indicating [453] that you had discussed the question of the requirements of the specifications ASTM A-17/29 With Mr. Schlaugh, did they?

A. No; they didn't.

Q. And, as a matter of fact, it is not customary for a steel producer to raise the question of the requirements of the specifications with the customer, is it? A. No; it isn't.

Q. And you don't as a rule, do you?

A. No. I might be embarrassed.

Q. You might be embarrassed because you wouldn't want to show your ignorance of not knowing what the specifications were; is that right?

A. That is right.

Q. So that in this instance you were quite well

(Testimony of Richard Hargos.)

satisfied that there was no discussion between you and Mr. Schlaugh concerning the requirements of ASTM A-17/29 specifications?      A. Yes.

Mr. Morrow: That is all.

### Redirect Examination

By Mr. Gantt:

Q. Don't you assume, however, Mr. Hargos, that your customers know what they are ordering?

A. Oh, yes. [454]

\* \* \*

### FRANK HARTMAN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your name and spell your last name, please?

The Witness: Frank Hartman, H-a-r-t-m-a-n (spelling).

### Direct Examination

By Mr. Morrow:

Q. Mr. Hartman, will you please state your full name?      A. Frank Hartman.

Q. And what is your address?

A. 4070 24th Place South.

Q. And what is your occupation?

A. Mill plant superintendent.

Q. And who is your employer?

A. Isaacson Iron Works.

(Testimony of Frank Hartman.)

Q. What is a mill plant superintendent; what are your duties?

A. I have charge of telling the melters what specific metal we are pouring, and what size ingots, and adjusting the chemical composition and the general supervision of the melting. [456]

Q. How long have you been in the steel business?      A. Since 1923.

Q. And what was your first employment?

A. As chief chemist at National Brake and Electric Company at Milwaukee, a subsidiary of Westinghouse.

Mr. Gantt: Mr. Hartman, can you speak up a little louder?

The Witness: Yes, sir.

The Court: Chief chemist where?

The Witness: National Brake and Electric Company, Milwaukee, Wisconsin.

Q. (By Mr. Morrow): And how long were you so employed?      A. About four years.

Q. Who was your superior there?

A. Mr. Greenough, who was a metallurgist.

Q. He was a metallurgist; what was your next employment?

A. Chemist at Norberg Company, Milwaukee.

Q. Did you follow Mr. Greenough?

A. Mr. Greenough; yes.

Q. How long were you in that position?

A. About one year.

Q. And then what was your next position?

A. And then I took—to be temporary—a job

(Testimony of Frank Hartman.)

as [457] Chief Chemist to straighten out some trouble at a drop-forge plant at Cudahy, Wisconsin.

Q. Where is that located?

A. At Cudahy, Wisconsin.

Mr. Gantt: Can you speak louder?

The Court: Keep your voice up.

Mr. Morrow: I will examine from back here, because I would like to hear too. I will stand back here, and if I can hear, I am sure the rest of them can.

Q. (By Mr. Morrow): Where did you go from there?

A. I came out here on the Coast, to Washington Iron Works.

Q. And who was your superior there?

A. Mr. Greenough.

Q. What was his position?

A. He was foundry superintendent.

Q. And I believe you said he was a metallurgist?

A. Yes.

Q. When did you go to work at the Washington Iron Works?      A. On February 1, 1928.

Q. And how long were you at the Washington Iron Works?      A. Until 1943. [458]

Q. How many years, approximately?

A. That would be eleven years—twelve—about fifteen.

Q. What was the nature of the business of the Washington Iron Works during your period of employment with them?

(Testimony of Frank Hartman.)

A. It was an iron foundry and steel foundry.

Q. Did they have any facilities for rolling or forging?

A. They had a small blacksmith shop and a small steam hammer just for tools.

Q. But it was primarily a foundry?

A. It was primarily a foundry; yes.

Q. What was your job?

A. I was chemist and metallurgist for four years, and then Mr. Greenough left there and I was made foundry superintendent.

Q. Are you familiar with the processes used in the manufacture of steel in the foundry?

A. Yes.

Q. Now, following your employment at Washington Iron Works, where did you go?

A. To Isaacson Iron Works.

Q. In what capacity?

A. I started as a chemist and later assistant mill plant [459] superintendent, and now mill plant superintendent.

Q. I can't quite hear you, sir.

A. I started as a chemist in the laboratory, and then I became assistant mill plant superintendent and then mill plant superintendent.

Q. And how long have you been mill plant superintendent?      A. About seven years.

Q. Now, in your present capacity as mill plant superintendent at Isaacson Iron Works, what kind of work do you do?      A. Cast ingots.

Q. Yes?

(Testimony of Frank Hartman.)

A. Casting of ingots for forging of billets or shafting.

Q. What else do you do?

A. My capacity, you mean?

Q. I can't hear.           A. At the plant?

Q. At the plant.

A. Or what I do personally?

Q. What you do, and what is done under you—both.

A. Well, I supervise the pouring of the ingots. The ingots are taken down to the forge shop and reheated [460] and put through the press or hammer and made into billets or different forgings, or whatever is required for the end product.

Q. Now, do you specialize, Mr. Hartman, in the refinement of steel?           A. Yes.

Q. By heat treatment?

A. I do not; no. That is in the heat treating department.

Q. That is in the heat treating department—is that your department?           A. No; it is not.

Q. You are in the melting department?

A. In the melting only.

Q. Now, when you were at the Washington Iron Works in the foundry, what kind of work did the foundry do under your supervision as plant superintendent, so far as the pouring of steel was concerned?

A. Well, we had an iron foundry and a steel foundry, both; and the iron foundry made diesel engine castings, and in the steel foundry we made



(Testimony of Frank Hartman.)

castings for gold dredges, locomotives, donkey engines and all sorts of jobbing work.

Q. Now, what is an ingot?

A. An ingot is a casting poured into a mold; it [461] is metal poured into a mold, subsequent to forging or rolling.

Q. Did you say subsequent to forging? You mean prior to?

A. The casting, subsequent to pouring—the casting subsequent to forging or rolling.

Q. Well, now, I perhaps misled you.

The question is: What is an ingot?

A. An ingot is a casting.

Q. An ingot is a casting. Now, what is a billet?

A. A billet is a semi-finished product of a hot rolled or forged ingot.

Q. What is a casting in the terms used as manufactured by the foundry?

A. A casting is molten metal poured into a mold. Whatever object results is the casting.

Q. What is the substantial—are the substantial differences between a casting manufactured in a foundry and a billet manufactured in a steel product plant producing forging quality ingots?

A. Well, one is cast to shape and the other has been worked from an ingot.

Q. When you say “cast to shape,” you are referring to the product produced by a foundry, are you?      A. Yes. [462]

Q. And what kind of shapes are we producing at a foundry?

(Testimony of Frank Hartman.)

A. Well, there is a pattern made. It may be a gear or an anchor, various intricate shapes. They are all made from a wooden pattern cast in a sand mold.

Q. Are those shapes and patterns used in a foundry—or, I should say, do those——

Mr. Morrow: Strike the first part of that.

Q. (By Mr. Morrow, continuing): Do those shapes and patterns used in a foundry outline the product which is in the same shape as the finished product? A. Yes.

Q. In other words, the pattern or shape used in a foundry, whether it be a gear wheel or an anchor or what not, is started out as a pattern; and what is the next process—molding?

A. It is molded in the mold.

A. It is molded in the sand mold.

A. And sand is rammed around it.

Q. And the end product is the same pattern and shape as the mold; is that right?

A. That is right.

Q. Now, would you describe—suppose that you made a gear of forging quality steel; would you describe [463] the process that you would go through or the product, plant and mill would go through in producing the same end product?

A. The ingot would be stripped from the mold and put in a reheating furnace.

Q. What would be the shape of that?

The Court: Do you have something?

Mr. Gantt: I had in inquiry as to what is the

(Testimony of Frank Hartman.)

purpose of this, that this evidence is being offered for on this point? I am not sure I follow the issues.

The Court: Mr. Morrow?

Mr. Morrow: It goes to the very issue of the case; the Pittsburgh Company, in our theory of the case, approved the manufacture of steel billets by a foundry to conform to specifications of the American Society for Testing Materials; and we are showing by this testimony that under no stretch of the imagination could a foundry produce a billet, and in order to do that, we want to show by this witness, as he has already testified, that a foundry produces an end product by starting, first of all, with a pattern——

The Court (Interposing): I think that covers it.

Mr. Morrow: Yes.

The Court: In other words, you are showing—you [465] are trying to show the difference between a casting——

Mr. Morrow (Interposing): That is right; and the difference between the two types of processes.

The Court: Very well.

Q. (By Mr. Morrow, continuing): What shape is the ingot?

A. An ingot can be various shapes, round or corrugated shapes, fluted shapes, or square.

Q. Need it necessarily compare in any respect to the shape of the end product? A. No.

Q. What is the next process?

A. It is reheated in a forging or heating furnace

(Testimony of Frank Hartman.)

and then taken under the press and worked down under the press.

Q. And what is the product that is produced?

A. It is a billet.

Q. Now, assuming, as we did, that you are going to manufacture the same gear wheel that was forged according to a pattern in the foundry, but you are going to do it by this process you now describe; what would be the next step that would be taken?

A. Well, it would be rounded up to a dimension allowing enough finish for machining and getting in intricate parts. A gear is usually one with spokes and a hub, and [465] would not be made in a forge shop.

Q. It will be? A. No.

Q. But there are products that would be?

A. Yes, like pinions.

Q. After the billet—is the billet manufactured by, say, a forging quality reduction plant subject to further heat treatment and working into desired shapes? A. Yes.

Q. And also to machining, is it not?

A. Machining, yes.

Q. You are familiar with the ASTM A-17/29—I should say, you have familiarized yourself with the ASTM 17/29 specifications? A. Yes.

Q. What does the term “secondary piping” refer to?

A. The shrinkage, cavity or void may be due to gas escaping and shrinkage of the metal.

Q. Is the term used in connection with, say,

(Testimony of Frank Hartman.)

billets or castings? A. It is used in both cases.

Q. It is used in both cases; what does the term "blow-hole" refer to?

A. It is a gas pocket collected through the evolution of gas which does not escape during the solidification [466] of the metal.

Q. Is that in connection with the casting, or——

A. (Interposing): That is the casting.

Q. That is the casting; now, if you found blow-holes in castings, Mr. Hartman, would that be considered defective steel?

A. It would be considered a defect in the casting.

Q. Would the casting itself be considered unsound? A. It would be unsound.

Q. And consequently a subject of rejection?

A. Yes.

Q. In your opinion, Mr. Hartman, can the specification ASTM A-17/29 in any way be used in—as a guide for the manufacturing of a casting?

A. No.

Q. Why not?

A. It refers to billets in that specification.

Q. Can, in your opinion——

Mr. Morrow: Strike that.

Q. (By Mr. Morrow, continuing): By the way, referring to Plaintiff's Exhibit No. 6, which is a quotation—I am sorry—Plaintiff's Exhibit Number 1—and the terms therein used, I would like to have you read this setting forth those specifications. [467]

I would like to have you refer to the term "or

(Testimony of Frank Hartman.)

nearest equivalent," and ask you what that term refers to, and what is meant by that?

A. It refers to the chemical composition or the grade.

Q. Does it in any way amend, alter or change the specific specification ASTM A-17/29?

A. No.

Q. Now, would you, Mr. Hartmann, have a forging quality steel by a foundry manufacturing or producing castings by a process of pouring the steel in flat molds?

A. Not unless it was good, sound metal.

Q. Well, put it another way: Is the pouring—is the pouring of steel in flat molds by a foundry a recognized method of producing forging quality steel? A. No.

Q. Is it done in that manner?

A. Forging steel?

Q. Yes. A. No.

Q. In order to make forging quality steel at a foundry, state whether or not it would be necessary to have a vertical mold? A. I would say, yes.

Q. And is it your conclusion that if you have a [468] flat mold that you do not produce a forging quality steel? A. No.

Q. Is that your conclusion? A. Yes.

Q. And what is meant by forging quality steel?

A. Steel that can be reworked in the press or rolling mill.

Q. Now, I wish to refer you to paragraph 10 (a)

(Testimony of Frank Hartman.)

of the ASTM specifications, which are contained in Plaintiff's Exhibit 41.

I will point the paragraph out to you, and ask you to examine the same.

(Whereupon, there was a brief pause.)

Q. (Continuing): Tell me what part of the process of manufacture does the paragraph in respect to chipping, being paragraph 10 (a) of the specification, relate to?

Mr. Gantt: Objection, your Honor. This is cumulative. I think Mr. Hargos went into all this yesterday step by step.

The Court: It is just a second expert on the same question, isn't it?

Mr. Morrow: Well, your Honor, the expert yesterday didn't say he had ever worked in a foundry, and this expert has said he worked in a foundry, and knows both processes intimately. [469]

The Court: Yes. I will overrule the objection.

A. That is refinement after final inspection.

The Court: Mr. Reporter, will you read the question?

(Whereupon, the following was read by the reporter: "Q. Now, I wish to refer you to paragraph 10 (a) of the ASTM specifications, which are contained in Plaintiff's Exhibit 41. I will point the paragraph out to you and ask you to examine the same. Tell me what part of the process of manufacture does the paragraph in

(Testimony of Frank Hartman.)

respect to chipping, being paragraph 10 (a), of the specification, relate to?"')

A. (Continuing): That would be the final inspections before shipment.

Q. (By Mr. Morrow): Well, does it relate to the process of manufacture in the ingot stage?

A. No.

Mr. Morrow: Well, that is all. Well——

Q. (By Mr. Morrow): Assume the following hypothetical facts, Mr. Hartman:

That there are 750 castings weighing approximately 540 pounds each, or a total of 404,795 pounds or [470] 180.5 gross tons at Seattle, Washington, in August, 1952, of the size 9½ inches by 4 inches by 4 feet one-half inch, and there are 54 castings 6 inches by 3 inches by 10 feet, weighing approximately 610 pounds each, totaling 33,465 pounds, or 14.9 gross tons, and that those castings have been manufactured by a foundry pouring the steel flat into sand molds, and assume that they are sound.

Now, what use or uses could such material be put to?

The Court: Poured steel mold?

Mr. Morrow: Pardon?

The Court: Did you say steel?

Mr. Morrow: Sand mold.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter:)



(Testimony of Frank Hartman.)

“Q. Assume the following hypothetical facts, Mr. Hartman:

That there are 750 castings weighing approximately 540 pounds each, or a total of 404,795 pounds, or 180.5 gross tons at Seattle, Washington, in August, 1952, of the size 9½ inches by 4 inches by 4 feet one-half inch, and there are 54 castings 6 inches by 3 inches by 10 feet, weighing approximately 610 pounds each, totalling 33,465 pounds, or [471] 14.9 gross tons, and that those castings have been manufactured by a foundry pouring the steel flat into sand molds, and assume that they are sound.

“Now, what use or uses could such material be put to?”

Q. (By Mr. Morrow, continuing): Poured flat into sand molds.

Now, what use or uses could such material be put to, in your opinion? A. To remelt.

Q. To remelt? A. Yes.

Q. Would the material, in your opinion, have any value other than for scrap metal purposes?

A. No, not in that shape.

Mr. Morrow: That is all.

#### Cross-Examination

By Mr. Gantt:

Q. Mr. Hartmann, you testified that you are familiar with ASTM 17/29? A. Yes.

(Testimony of Frank Hartman.)

Q. And I believe you were asked whether ASTM 17/29 could be used with reference to making castings? A. Yes. [472]

Q. What was your answer?

A. I said "no," it refers to billets.

Q. How about the chemical requirements of ASTM?

A. They can be used in castings or anything.

Q. They can be used with reference to making castings? A. Yes.

Q. Your answer was "yes"? A. Yes.

Q. Why is that?

A. The chemical composition is different from the end product. This refers to a billet, not a casting.

In most cases you are almost always following some ASTM specification chemically.

Q. So that the chemical requirement of A-17/29 simply relates to the chemical composition of the steel? A. That is right.

Q. Whether it be a forging or a casting or a rolled product, is that right? A. That is right.

Q. You stated that the paragraph that counsel read you, being paragraph 10 (a) of A-17/29 relating to chipping, had reference to the final inspection before shipping; is that correct?

A. That is right. [473]

The Court: Is that in regard to—

The Witness (Interposing): The billet you are referring to.

(Testimony of Frank Hartman.)

Q. (By Mr. Gantt): Referring to the billet, you say?

A. Referring to the billet. It would be the grinding, grinding off of any defects before inspection.

Q. That chipping, though, is also quite common on castings, too, isn't it? A. That is true, yes.

Mr. Gantt: No other questions, Mr. Hartman. Thank you.

### Redirect Examination

By Mr. Morrow:

Q. Mr. Hartman, I believe you said on cross-examination that—you reiterated that this specification did not refer to casting, and indicated that if casting was intended, as I understand your testimony, there were other ASTM specifications, is that correct? A. That is correct. [474]

\* \* \*

### Recross-Examination

By Mr. Gantt:

Q. A customer could order a product according to a part of a specification in ASTM specifications, could he not?

The Court: There can be the same objection here.

Mr. Morrow: I am perfectly willing he answer it.

A. Usually in a casting specification they have the chemical composition put down too, as far as chemically.

(Testimony of Frank Hartman.)

You asked me if I could make a casting according to the chemical composition in this specification, and I said yes, you can make a casting or pour a billet or ingot with any specification, but there can be applied—the end product is going to be different in a forging than a casting. That is what I meant by my answer.

Mr. Gantt: No further questions, Mr. Hartman.

The Court: I want to ask you Mr. Hartman, with regard to chipping. You say chipping is common on castings, or something to that effect?

The Witness: Yes.

The Court: Under what circumstances do you chip, as that word is used, in connection with castings?

A. After the casting is shook out of the [477] mold, and it has to be cleaned up and the gates and risers are removed, usually by acetylene torches, the thins that run out from the casting—sometimes there is a sand pocket, and that is chipped out by welding.

The Court: That is all. [478]

\* \* \*

PARKER M. ROBINSON

upon being called as a witness for and on behalf of the defendant, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Parker M. Robinson, R-o-b-i-n-s-o-n (spelling).

Direct Examination

By Mr. Gantt:

Q. Will you state your name, sir?

A. Parker M. Robinson.

Q. What is your address?

A. 50 Chumasero Drive, San Francisco.

Q. And what is your occupation?

A. District Manager of the Pittsburgh Testing Laboratories, in San Francisco.

Q. And how long have you held that job?

A. Since 1946.

Q. Have you been with Pittsburgh Testing prior to 1946? A. No.

Q. Do you have a college degree? A. Yes.

Q. In what specialty? [846]

A. I graduated from the University of Pittsburgh in 1911 with a Bachelor of Science degree in Mechanical Engineering.

I further have a degree, a post-graduate degree, from Yale University, 1916, in Mechanical Engineering.

Q. Are you a member of any professional societies? A. Yes.

(Testimony of Parker M. Robinson.)

Q. Will you state what societies you are a member of?

A. I am a full member of the American Society of Mechanical Engineers, the Society of Naval Architects and Marine Engineers, the Structural Engineer Association of Northern California, the American Society of Testing Materials, the American Concrete Institute.

Q. Do you hold any licenses as an engineer?

A. Yes.

Q. What are they?

A. I hold professional licenses in California for Civil Engineering and Mechanical Engineering. I hold professional engineer licenses in Utah and in Oregon.

Q. You testified that you were with Pittsburgh Testing Laboratory from 1952—I mean from 1946 to the present time?      A. Yes.

Q. And has that service always been in the San [847] Francisco office of Pittsburgh?

A. All except one year. During the year 1951 I was transferred as District Manager of the Chicago District, and stayed there just about one year.

Q. And when did you return to San Francisco?

A. In February, 1952.

Q. Now, what business experience do you have, did you have prior to coming to work for Pittsburgh? Start with the job you had prior to coming to Pittsburgh in 1956—in 1956, I beg your pardon? Pittsburgh in 1956—in 1946, I beg your pardon?

A. Prior to that I had been Chief Engineer of the Engels Shipbuilding Company in Pascagoula, Mississippi.

(Testimony of Parker M. Robinson.)

Prior to that I was Chief Engineer of the Western Pipe and Steel Company in San Francisco, which was the predecessor of the present Consolidated Western Steel Division of the United States Steel Corporation.

Prior to that for 16 years I was vice president and Chief Engineer of a company called Hunt-Murk and Company in San Francisco, whose business was to design and build steam power plants.

If you want back further than that, I was with the Westinghouse Company as their steam turbine and power plant engineer for the Pacific Coast.

Q. I think that is enough of your business background. [848]

Q. Now, are you a member of ASTM, American Society of Testing Materials? A. Yes.

Q. How long have you been a member?

A. Since 1950.

Q. Is Pittsburgh Testing Laboratory a member?

A. Yes.

Q. How long has it been a member?

A. Pittsburgh Testing Laboratory was recently awarded a 50-year plaque, or some sort of a memorial, indicating that they had been members for over fifty years.

Q. When was ASTM founded? A. 1902.

Q. Now, you heard the testimony last Thursday and Friday, of Mr. Hargos, of Isaacson Iron Works, did you? A. Yes.

Q. Do you agree with Mr. Hargos' statement of the principal purposes of ASTM?

(Testimony of Parker M. Robinson.)

Mr. Morrow: Object to the form of the question as being leading, and it has no reference to any particular testimony of Mr. Hargos, and it is too indefinite and vague.

The Court: As to the purposes of ASTM? [849]

Mr. Morrow: I have no objection to his asking the witness what his idea of the purposes are; but the form of the question is, does he agree with Mr. Hargos?

The Court: I think the objection is well taken.

Q. (By Mr. Gantt, continuing): What is the purpose of ASTM, American Society of Testing Materials, Mr. Robinson?

A. I think if you will permit me to read from the book itself, it puts it in better words than I could myself.

Q. Handing you Defendant's Exhibit A-33, which is the 1939 Book of Standards, Part I, on Metals, of the ASTM Society—

The Court (Interposing): What exhibit number is that, Mr. Gantt?

Mr. Gantt: Exhibit A-33, your Honor.

Q. (By Mr. Gantt, continuing): Would you proceed?

A. It says in the frontispiece of this volume that the purposes are:

“The promotion of knowledge of the materials of engineering and the standardization of specifications and the methods of testing.”

It further states that the: [850]



(Testimony of Parker M. Robinson.)

“A.S.T.M. specifications, definitions and methods of test are used as standards for engineering materials because they are competent, unbiased, widely applicable and authoritative.” And

“A.S.T.M. standards are unbiased because each standing committee charged with the development or supervision of standards having a commercial bearing is made up of approximately equal representation of producing, consuming, and general interests, the latter including engineering consultants, schools, independent research institutes, governmental technical agencies.”

Q. Then, I take it that ASTM specifications are not only for testing, inspection, but also a guide for the producer and consumer?

A. Very much so.

Q. And what committee of the American Society of Testing Materials had jurisdiction over ASTM specification A-17/29?

A. The Committee on Steel, which is known as A-1.

Q. Does Pittsburgh Testing Laboratory have a member on this committee? A. Yes.

Q. Has it had that for some time? [851]

A. I would say for at least 30 years, and possibly more.

Q. What member of Pittsburgh Testing Laboratory was on this committee?

A. For many years Mr. A. R. Ellis, who was the Chairman of our Board, was on that A-1 Com-

(Testimony of Parker M. Robinson.)

mittee, up until the time of his death in December, 1954.

Q. Handing you Plaintiff's Exhibit 56, which is the 1930 edition of ASTM Standards, Part I, on Metals, I ask you if you are familiar with ASTM A-17/29 specification? A. Yes, I am.

Q. Were you familiar with it in 1952?

A. Yes.

Q. Now, how is it designated in the book; how is this specification designated?

A. It is designated as A-17/29.

Q. Is there anything else in the heading of it?

A. Well, it states that these specifications are: "Issued under the fixed designation A-17; the final number indicates the year of original adoption as standard, or in the case of revision, the year of last revision."

Now, this A-17 was adopted originally in 1913. It was revised in 1918, 1921 and 1929; therefore, [852] it carries the A-17/29 designation.

Q. Now, Mr. Robinson, can you define a billet, or will you define a billet?

A. I could define a billet, but I would prefer to use the definition of a metallurgical authority, and if you would let me see Henderson's "Metallurgical Dictionary," I would prefer to use that.

Mr. Gantt: This is for illustrative purposes, your Honor. We have a metallurgical dictionary of Bates and Henderson. I can further qualify this witness by asking:

Q. (By Mr. Gantt): If this Dictionary of

(Testimony of Parker M. Robinson.)

Henderson and Bates, 1953 edition, is a current metallurgical dictionary?      A. Yes, it is.

Q. And you are familiar with it?      A. I am.

Q. And is it in the trade, known in the professional engineering trade, is it a competent work on the subject of metallurgical dictionaries?

A. Yes, it is considered very authoritative.

The Court: I assume it was current in 1952?

Mr. Gant: This book is actually the 1953 edition; the 1953 edition. [853]

\* \* \*

Q. (By Mr. Gantt): I am handing you a metallurgical dictionary, it being Exhibit A-34, by J. G. Henderson, and ask you if you can, by reference to the metallurgical dictionary, define the word "billet"?

A. Yes. In this dictionary the word "billet" is given three definitions.

The first definition is:

"Any solid metal casting of cylindrical, square or rectangular shape."

Definition number two:

"A rectangular semi-finished rolled ingot with cross-section of from four to thirty-six square [855] inches, having a width less than twice its thickness.

"When the cross-section exceeds thirty-six square inches the term bloom is used. Small sizes are usually classed as bars or small billets."

The third definition:

"A solid cylindrical casting of brass, bronze or

(Testimony of Parker M. Robinson.)

copper intended for subsequent extrusion to form brass or bronze rods or tubes, or processing by the mannesmann process to form copper tubing.”

The latter definition, of course, does not apply to steel.

Q. Now, I note——

Mr. Morrow (Interposing): Pardon me. You say—well, go ahead. I will withdraw my objection and wait for the question.

Q. (By Mr. Gantt, continuing): Now, referring you to Exhibit 56, which is the 1930 edition of ASTM, Part I, on Metals, the first portion, the first paragraph, numbered paragraph one, refers to blooms and slabs? A. Yes.

Q. What is a bloom, Mr. Robinson?

A. There, again, I would prefer to go back to this dictionary, and they give bloom in here, and I quote the first definition: [856]

“A mass of wrought iron from the furnace, from which sinter and other impurities have been removed, and which have been made solid by shingling.”

The second definition:

“A bar of iron or steel, sometimes cylindrical, but usually square or nearly square in section, and not smaller than four inches on a side, formed from an ingot by forging or rolling.”

The third definition:

“A mass of iron or steel formed by forging or rolling after bushelling.”

(Testimony of Parker M. Robinson.)

Q. Now, what is the definition of a slab? That is also used in A-17/29.

A. I will also quote from this dictionary as to a slab, and it states:

“A rectangular piece of semi-finished steel from the blooming mill intended for subsequent rolling into plate.”

Q. Now, Mr. Robinson, A-17/29, paragraph 3, states:

“Basis of purchase.”

What is stated in paragraph 3 on “basis of purchase”? A. That reads as follows:

“Billets shall be purchased as semi-finished [857] rolled or forged material.”

Q. Now, what is semi-finished steel as used in the steel trade?

A. Again, I read from the dictionary. It says:

“Semi-finished”—and I quote:

“Steel in forms that require further work or treatment before it is ready for the market. It includes billets, blooms, ingots, sheet bars, slabs, wire rods, etc.”

Q. Now, what was the status of specification A-17/29 in 1952?

A. It had been superseded by other specifications, and it was, therefore, obsolete.

Q. Do you know when it was superseded?

A. The last ASTM book in which it appeared was 1942, and the 1944 book shows it superseded specifications A-27/3 and A-27/4.

Q. Now, how often are these volumes which we

(Testimony of Parker M. Robinson.)

have been referring to, Exhibit 56, and Defendant's Exhibit 33, being various editions of the ASTM standards, Part I, on Metals—how often are those issued or published?

A. The usual practice is to publish every three years. However, during the war they did get out editions every two years, because there were various changes that [858] were coming along pretty fast.

Q. What volume of the ASTM Standards, Part I, on Metals, was current in the year 1940—in the year 1952? A. The 1949 edition.

Q. Now, in your business in San Francisco, in the Pittsburgh Testing Laboratory, how do you look up a specification if a request is made to inspect to a specification?

A. There is an index in each volume and you look up that index and find out the page, and turn to that page.

Q. And if a particular specification number does not appear in the index, how do you find it?

A. When a specification number does not appear, it is apparent that it has been superseded and you go to the previous volume and look in the index there.

If it isn't there, you go to the next previous volume until you work back to the point where you do find it.

Q. Now, Mr. Robinson, are you familiar with the Grace order for inspection to Pittsburgh of billets involved in this case? A. Yes.

Q. Will you tell us when you first—your first

(Testimony of Parker M. Robinson.)

connection or contact with this order of Grace for Pittsburgh to inspect? [859]

A. My first knowledge of the order came through Mr. Clark of our office, who came to me and told me that he had had telephone conversations with Mr. Gips of the W. R. Grace Company, and that he had given us an order to inspect certain steel products.

Q. What did you do then?

A. We discussed it and since it was apparently in a rush, I suggested that Mr. Clark call our Seattle office, since the work was to be done in the Seattle district, and give them complete information as to the execution of the order.

Q. Now, do you know or can you fix the date of your conversation with Mr. Clark, the first conversation with Mr. Clark concerning the order with Grace and Company?

A. I made notes of that conversation and dated them.

Q. Handing you what has been admitted as Plaintiff's Exhibit 67, I ask you if you can identify those notes?      A. Yes, those are my notes.

Q. Then will you tell us, if you can, first, the date of your conversation with Mr. Clark?

A. Yes, these notes are dated May 16, 1952. My conversations with Mr. Clark were on that day.

The Court: May 16th? [860]

The Witness: May 16, 1952.

Q. (By Mr. Gantt): What was your next connection with the order of Grace and Company?

(Testimony of Parker M. Robinson.)

A. We received a letter from Mr. Gips confirming that he had given us his order. I think that was on the 20th, and I answered that letter acknowledging receipt of his letter the very next day, the 21st.

Q. Handing you Plaintiff's Exhibit 21, is that the letter you received——

A. (Interposing): Yes, it is.

Q. (Continuing): ——from Grace and Company on the billets?

You stated you answered it. When was this received by you? Does it show?

A. Yes, our receiving stamp is on here. It was received May 21st. The letter is dated May 20th.

Q. And you wrote an answer or an acknowledgment of the letter?      A. Yes, I did.

Q. Handing you Exhibit 22, will you state what that is?

A. I acknowledged Mr. Gips' letter by writing him a letter on May 21st.

Q. What was your next connection, or what did you [861] do next in connection with this order?

A. We had, as is usual, an internal job order made up and a copy of that was sent to our Seattle office to go with the forwarding letter.

Copies also, of course, went to our Pittsburgh headquarters.

Q. Handing you what has been marked Defendant's Exhibit A-7, I will ask if that is the job order you refer to?      A. Yes, it is.

Q. And was that prepared under your direction



(Testimony of Parker M. Robinson.)

in San Francisco?           A. It was.

Q. Handing you Defendant's Exhibit A-6, will you state what that is? Is that the covering—

A. (Interposing): This is the covering letter going to Seattle office of P. T. L. enclosing this work order; and, incidentally, it refers back to Mr. Clark's letter here, giving them instructions, confirming the verbal instructions.

Q. Now, this letter, Exhibit A-6, was written by you, Mr. Robinson?           A. Yes.

Q. That is your signature?

A. That is correct. [862]

Q. And the job order, A-7, was attached to it and sent on up to Mr. Johnson?           A. Yes.

Q. And this was prepared under your direction, and you saw it as you signed this letter?

A. That is right.

Mr. Gantt: I offer these in evidence, your Honor, Defendant's Exhibits A-6 and A-7.

Mr. Morrow: Objected to solely on the grounds that they tend to vary the terms of the written contract between Grace and Pittsburgh.

The Court: The Court's ruling would be the same with respect to these exhibits as to the others. They are received as evidence of transactions relating to the matters covered by the alleged contract and they may or may not serve to vary the terms of the contract. I don't think they can be admitted for that purpose.

Mr. Gantt: They are admitted, though?

The Court: They are admitted.

(Testimony of Parker M. Robinson.)

(Defendant's Exhibits Nos. A-6 and A-7 admitted in evidence.)

Q. (By Mr. Gantt): Now, you stated that your first connection with the steel order, or the order to inspect the billets, from Grace and Company, was when Mr. Clark came in—— [863]

A. (Interposing): Yes.

Q. (Continuing): ——and talked to you, May 16th; and did Mr. Clark give you any communication or notes at that time?

A. Yes, he did.

Q. I hand you what has been marked for identification as Defendant's Exhibit A-1, and ask you if you can identify the handwriting?

A. Yes, I am quite familiar with Mr. Clark's handwriting, and this is it.

Q. That is what?

A. Mr. Clark's handwriting.

Q. Can you tell us what the exhibit is?

A. This is Mr. Clark's notes on his conversation with Mr. Gips of W. R. Grace Company regarding the order which they had agreed upon.

Q. And were those handed to you?

A. Yes.

Q. By whom?           A. By Mr. Clark.

Q. On what day?

A. The 16th of May, 1952.

Q. Did you later return those to Mr. Clark?

A. I did.

Mr. Gantt: I offer this in evidence. [864]

(Testimony of Parker M. Robinson.)

Mr. Morrow: The same objection as made with respect to A-6 and A-7.

The Court: That is the only ground of the objection?

Mr. Morrow: Yes, your Honor.

The Court: Is Mr. Clark present? Is he going to testify?

Mr. Gantt: Yes, your Honor; he is present. The witness has identified his handwriting, and the two gentlemen have worked together. I can ask that question to go over if your Honor would like.

Mr. Morrow: I am satisfied Mr. Clark will testify they are his notes.

The Court: I don't know, if that is the only objection that I would sustain the objection. There are other objections that would make it not admissible, but if it is solely that it tends to vary the terms of an integrated contract I wouldn't receive it for that purpose, but not recognize that as sufficient grounds to exclude it.

Mr. Morrow: You mean you will receive it on grounds——

The Court (Interposing): Relating to circumstances surrounding the transaction, which may have some bearing on the meaning or interpretation of the contract as well as possibly, ultimately, if the Court should so [865] find it may have a bearing on what the Court concludes is the contract; but as notes I would think that as such they are admissible.

Mr. Gantt: Well, the authenticity and the fact

(Testimony of Parker M. Robinson.)

that they were made and that they were inter-office records was agreed upon in the pretrial order.

The Court: They will be admitted as indicated.

(Defendant's Exhibit No. A-1 admitted in evidence.)

Q. (By Mr. Gantt): Now, Mr. Robinson, I will hand you what has been marked Defendant's Exhibit A-3, and ask if you will—if you can identify the signature appearing on that letter?

A. Well, this letter——

Q. (Interposing): Can you identify the signature first?

A. Yes, I can. It is Mr. W. W. Clark's, and I recognize his signature.

Q. And he is in your office in San Francisco?

A. Yes.

Q. And has been there for how many years?

A. Since 1948.

Q. He was there in 1952? A. Yes.

Q. Will you state what Exhibit A-3 is? Did it ever [866] come to your attention?

A. Yes. This is a letter of May 17, 1952, from Mr. Clark to our Seattle office, telling him that we had an order for certain things, and how to inspect for it.

Q. And did you see the letter before it was sent out? A. Yes.

Mr. Gantt: I offer Defendant's Exhibit A-3.

Mr. Morrow: I object to this on the ground that

(Testimony of Parker M. Robinson.)

it tends to vary the terms of the written agreement between Grace and Pittsburgh.

Mr. Gantt: I offer Exhibit A-3 in evidence.

The Court: The Court will receive this on the same basis as the others, not for the purpose of varying terms of the agreement, but as one of the circumstances surrounding the transaction.

(Defendant's Exhibit No. A-3 admitted in evidence.)

Q. (By Mr. Gantt): Now, do you have the 1930 edition of ASTM there, Mr. Robinson?

A. Yes.

(Whereupon, there was a brief pause.)

Mr. Gantt: Excuse me a minute, your Honor.

(Whereupon, there was a brief pause.) [867]

Q. (By Mr. Gantt): Now, you have testified, Mr. Robinson, that you are familiar with the order from Grace and Company to Pittsburgh to inspect steel billets produced at the Seattle Foundry?

A. Yes.

Q. In May, 1952? A. Yes.

Q. Now, I wish you would please take—please refer to ASTM A-17/29 specifications, which is Plaintiff's Exhibit 56, and refer to the first paragraph thereof.

A. The first paragraph states that the term, "billet," is used in these specifications "to include blooms, billets and slabs."

(Testimony of Parker M. Robinson.)

Mr. Gantt: If the Court please, I would like permission to read Defendant's Exhibit A-1.

The Court: A-1?

Mr. Gantt: I have it here. Defendant's Exhibit A-3—into the record at this time.

The Court: All right.

Mr. Gantt: Defendant's Exhibit A-1 is previously admitted.

It states:

"Seattle office.

"Order from W. R. Grace and Company, 2 [868] Pine Street, S. F.

"Mr. Gips.

"200 tons cast steel billets approximately divided:

"750 billets 9½ inches by 4 inches by 4 feet, 0 and ½ inches, A-17/29, Type A, Grade 2.

"50 billets 6 inches by 3 inches by 10 feet 0 inches, A-17/29, Type A, Grade 1.

"Sample each heat (ladle sample is best) for analysis, and send drillings to us about one and one-half ounces.

"Inspect for visual defects that cannot be chipped out easily. Watch Grade 2 for internal pinholes on sand cast billets.

"Steel going to New Zealand Government Trade Commission.

"Price \$4.00 hour for inspection and sampling. \$10.00 a sample for C.Mn.P.S. and Si.

"Shipment in 60 to 90 days.

"Contact Foundry and be prepared to obtain samples and inspect billets."

(Testimony of Parker M. Robinson.)

And then in the letter of May 17th, inter-office letter from Mr. Clark to the Seattle office of Pittsburgh Testing Laboratory:

“We have received the following order from [869] W. R. Grace and Company to be executed in Seattle.

“200 tons cast steel billets approximately divided:

“750 billets 9½ inches by 4 inches by 4 feet 0 and ½ inches, A-17/29, Type A, Grade 2.

“50 billets, 6 inches by 3 inches by 10 feet 0 inches, A-17/29, Type A, Grade 1.

“Sample each heat (ladle sample is best) for analysis and send drillings to us, about one and one-half ounces.

“Inspect for visual defects that cannot be chipped out easily. Watch Grade 2 for internal pinholes.

“Steel going to New Zealand Government, Trade Commission.

“Price \$4.00 per hour for inspection and sampling. \$10.00 a sample for C,Mn,P,S, and Si.

“Shipment in 60 to 90 days.

“Please contact Seattle Foundry Company and be prepared to obtain samples and inspect billets.

“Copy of order will follow.

“W. W. Clark.”

And then I would like to read, have permission to read, Exhibit A-7, which is the job order, which Mr. Clark referred to — Mr. Robinson referred to. [870]

It is entitled:

“Pittsburgh Testing Laboratory.

“Date, 5-21-52.

(Testimony of Parker M. Robinson.)

“Order No. SF 5799.

“Contract from W. R. Grace and Company, No. 2 Pine Street, San Francisco, California.

“To inspect (give description of contract and quantity) 800 steel billets at Seattle Foundry Company, chemical analysis of samples for shipment to New Zealand Government Trade Commission.

“750 billets, specifications ASTM A-17/29, Type A, Grade 2, 9½ inches by 4 inches by 4 feet ½ inch; 50 billets, specifications ASTM A-17/29, Type A. Grade 1, 6 inches by 3 inches by 10 feet.

“800 billets, 200 tons cast steel.”

Mr. Morrow: I beg your pardon, estimated tons.

Mr. Gantt: “Estimate quantity.”

I am not sure whether that is before it or not. The words “estimated quantity.”

“800 billets, 200 tons cast steel.”

“Contract placed with Seattle Foundry Company, Order No. Ltr 5-20-52.

“Work will commence 8-15 to 9-15-52.”

The Court: 8-15?

Mr. Gantt: 8-15. [871]

The Court: Does that mean August 15th?

Mr. Gantt: I gather that means August 15 to 9-15.

“Make 6 copies of reports to be sent as follows:

“2 to Pittsburgh,” or “PTG”;

“1 to SF file; 1 to Seattle file.

“Seattle to report on sampling and inspection to San Francisco who will combine this with analysis and make report to client.



(Testimony of Parker M. Robinson.)

“Price \$4.00 per hour, analysis \$10.00 per sample plus expenses.

“Total estimated value of inspection, \$150.00.

“Render bills to above.

“Make 3 copies of bills to be sent as follows:

“2 to above, 1 to S.F. file.

“Remarks:

“Sample each heat (ladle sample is best), inspect for visual defects that cannot be chipped out easily. Watch Grade 2 for internal pinholes. Seattle to sample and inspect, San Francisco to analyze and report.”

Q. (By Mr. Gantt): Is that the purchase order that you testified to? A. That is correct.

Q. Now, with respect to the ASTM volume which you [872] have in front of you——

Mr. Gantt: Pardon us one minute.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt, continuing): Now, will you refer to Exhibit 56, which is the specification that you have in your hand, A-17/29?

Mr. Morrow: Do you mean Exhibit A-7?

The Witness: No. 56.

Mr. Gantt: No, he has Exhibit 56.

Mr. Morrow: Very well; I am sorry.

Mr. Gantt: That is the standard specifications.

Mr. Morrow: That is your copy.

Q. (By Mr. Gantt): Then refer to paragraph 3 on “basis of purchase.” Will you read that, please?

A. Paragraph 3 reads as follows:

(Testimony of Parker M. Robinson.)

“Billets shall be purchased as semi-finished rolled or forged material.” [873]

\* \* \*

All right, Mr. Gantt, you may proceed.

Q. (By Mr. Gantt, continuing): Mr. Robinson, I believe you testified of your familiarity with ASTM A-17/29 as it appears in the exhibit—I believe it is Exhibit 56, which you have in front of you.

I think you have also testified that you are familiar with the contents of Mr. Clark’s letter of May 17 to the Seattle office of the Pittsburgh Testing Laboratory? A. Yes.

Q. Now, with reference to an inspection in accordance with Mr. Clark’s letter of May 17, and with reference to ASTM A-17/29, will you state whether paragraph 3 is applicable——

A. (Interposing): No.

Mr. Morrow: Now——

Q. (By Mr. Gantt, continuing): ——to such an inspection?

Mr. Morrow: Your Honor, I don’t at this point understand the purpose of Mr. Gantt’s questioning.

If it is for the purpose of proving an oral agreement in variation or in contradiction of the written agreement made up by the two letters, I wish to interpose an objection. [884]

If it is for the purpose of proving performance of an oral contract—that is, the performance of an oral contract—which is not as yet in evidence, I object for the reason that it is indirectly trying to

(Testimony of Parker M. Robinson.)

prove an oral contract in variation with the written contract.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Now, with reference to an inspection in accordance with Mr. Clark's letter of May 17, and with reference to ASTM A-17/29, will you state whether paragraph 3 is applicable to such an inspection?")

Mr. Morrow: And I object on the ground it is immaterial.

The Court: The question here is as to an inspection made under this letter which is A-3, inter-office communication between Clark and the Seattle office?

Mr. Gantt: Yes, your Honor.

The Court: Now, if he is testifying as an expert, that is one thing; I would think that is the only manner in which he could testify.

Mr. Gantt: He is testifying as an expert, your Honor.

The Court: And as expert testimony, I [885] think it may be admissible, but I don't know that that would—that is, as I construe the question.

Mr. Gantt: Yes, your Honor.

Mr. Morrow: May it be understood that my same objection goes to all this line of testimony, as to Mr. Robinson?

The Court: All right, if you wish your objection to show.

Mr. Morrow: Yes.

(Testimony of Parker M. Robinson.)

Q. (By Mr. Gantt): Now, do you, Mr. Robinson, want the question read back?

A. No, I know the question, and the answer is: "No, it does not apply."

The Court: You are speaking now of paragraph 3?

Mr. Gantt: Three.

The Court: Of the specification?

The Witness: Right.

Q. (By Mr. Gantt): Why doesn't paragraph 3 of ASTM A-17/29 apply, Mr. Robinson?

A. Because we were asked to inspect cast steel billets, and this refers to rolled and forged material.

Q. Does paragraph 4 apply?

A. Paragraph 4 reads: "That the steel shall be [886] made by either or both of the following processes, open hearth or electric furnace."

That does apply.

Q. Does paragraph 5 apply?

A. Paragraph 5 reads:

"A sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation."

That does not apply.

Q. Why not, Mr. Robinson?

A. Because in this case we do not go through the stage of pouring an ingot and then rolling it down or forging it down to a billet. These billets were cast in their final size and shape.

Q. Does paragraph 6 apply?

A. Paragraph 6 reads:

(Testimony of Parker M. Robinson.)

“Unless otherwise specified the billet shall be made from ingots of at least three times the cross-sectional area of the billet.”

That does not apply.

Q. Why not?

A. My answer is very similar to the previous one, that the pouring into ingots and then reducing to billets by rolling or forging was not contemplated.

Q. Does paragraph 7 of ASTM A-17/29 [887] apply?

A. Paragraph 7—I don’t think I need to read it all—it refers to the chemical analysis and chemical composition of the steel in the casting, and that, of course, does apply.

Q. Does paragraph 8 apply?

A. That is in regard to the ladle analysis of the steel, and, of course, that does apply. It is chemical composition again.

Q. Does paragraph 9 apply; 9(a)?

A. Paragraph 9(a) calls for a check analysis by samples taken directly from the billets, and it doesn’t apply because we had already sampled the steel that went into the billets by means of the ladle analysis.

Q. Does 9(b) apply?

A. No, paragraph 9(b) does not apply, because it is applicable to Grade 2 billets which are of a different chemical composition than called for on this transaction.

Q. Does paragraph 10(a) and (b) apply?

A. Paragraph 10 has to do with how the billets

(Testimony of Parker M. Robinson.)

are chipped and prepared for surface defects, how small defects are eliminated. That does apply.

Q. Does paragraph 11 apply?

A. Paragraph 11 is rather short. It says, "The billets shall be free from injurious defects and shall have a workmanlike finish." [888]

A. Yes; that applies.

Q. Does paragraph 12 apply?

A. Paragraph 12 is in regard to marking the billets, and that does not apply for the reason that 12(a) says, "The melt number shall be legibly stamped on each billet 6 inches or over in thickness or on billets of smaller sections when so specified."

Now, these billets were not over 6 inches in all of their cross-sectional dimensions, and we were not asked or specified to have them marked by the purchaser, so that it does not apply.

Q. Does paragraph 13 apply?

A. Paragraph 13 is a general paragraph regarding inspection, and that the inspector will have free entry into the plant, and so forth.

That is quite standard in most of the ASTM specifications, and, of course, would apply.

Q. What is paragraph 14?

A. Paragraph 14 is on the subject of rejection, and paragraph 14(a) states that, "Unless otherwise specified any rejections based on tests made in accordance with section 13(b)"—those are chemical analysis—"shall be reported within five working days from the receipt of samples."

Q. Does that apply? [889]

A. Yes, that applies.

(Testimony of Parker M. Robinson.)

Q. What is paragraph 14?

A. 14(b) says that "billets which show injurious defects while being finished by the purchaser will be rejected, and the manufacturer shall be notified."

That definitely applies.

Could I make any explanation to that?

Q. Well, no. Why would that apply? Would you explain why that applies?

A. It applies for this reason, that the inspection of the billets under this specification, and for surface defects only, many defects which could not be seen from viewing the billets from the outside might be found later by the purchaser at the time he was using those billets to machine them down to the finished part, the finished part for which they were using the billet, or maybe forging it down and rolling it down still further.

If they find internal defects, those then should be immediately reported to the manufacturer.

Q. Does paragraph—what is paragraph 15 concerned with?

A. Paragraph 15 is a matter of rehearing on any dispute about the chemical analysis. It does not apply in this case, since there was no controversy regarding the chemical analysis. [890]

Q. Now, Mr. Robinson, did Pittsburgh Testing Laboratory carry out its assignment given it by Grace in this case? A. Yes.

Q. And did Pittsburgh supply Grace with written reports of its inspection? A. Yes.

(Testimony of Parker M. Robinson.)

Q. I hand you what has been marked Plaintiff's Exhibit No. 25. Will you tell me what those are?

A. Those are reports issued by our Seattle office covering the inspection.

Q. Did they come to your attention?

A. A copy of them came to my attention.

Q. Shortly after they were prepared?

A. Yes.

Mr. Morrow: Is that 35?

Mr. Gantt: That is 35.

Q. (By Mr. Gantt): Mr. Robinson, did anyone from Grace in San Francisco tell you what the intended use of the billet was? A. No.

Q. Mr. Robinson, handing you what has been previously—what is marked as Exhibit 1, and previously identified as the letter dated April 3rd from the Grace [891] office in Washington, D. C., to the Grace office in San Francisco concerning obtaining inquires to fill an order for the New Zealand Government Trade Commission, have you seen that order prior to the claim in this case? A. No.

Q. Handing you what is marked Exhibit 11, which purports, and it has been identified as the purchase order which Grace and Company received from the New Zealand Government Trade Commission with respect to the billets in question here, had you seen that purchase order prior to the claim made by Grace against you in this case? A. No.

Q. Mr. Robinson, do you recall having written a letter to Mr. Gips shortly after the claim of the New Zealand Government came to your attention?



(Testimony of Parker M. Robinson.)

A. Yes, I do.

Q. Handing you what has been marked and admitted as Plaintiff's Exhibit 49, being a letter dated June 9, 1953, can you identify that?

A. Yes, I wrote that letter.

Q. And that letter was written by you on June 9, to whom?

A. To the Grace Company, to the attention of Mr. C. P. Gips.

Q. In San Francisco? [892]

A. In San Francisco.

The Court: Is that in evidence?

Mr. Gantt: Yes, your Honor.

The Court: What is the number?

Mr. Gantt: This is 49.

The Court: 49?

Mr. Gant: 49.

Q. (By Mr. Gantt): Now, did you hear the testimony of Mr. Murphy that he wrote a letter dated May 16, 1952, to W. R. Grace and Company, advising W. R. Grace and Company that he intended to pour the billets in sand molds, pouring both sizes flat? A. I heard that testimony, yes.

Q. Now, at the time you wrote this letter of June 9, 1953, did you know that Seattle Foundry had written such a letter——

Mr. Morrow (Interposing): Objected to as immaterial.

Q. (By Mr. Gantt, continuing): to Seattle Foundry or to W. R. Grace and Company?

(Testimony of Parker M. Robinson.)

Mr. Morrow: Pardon me. I object to the question as being immaterial.

The Court: Well, the exhibit is in. Either [893] it is material or not. The exhibit being in, I think the question is proper, and the objection is overruled.

Mr. Gantt: I think we had better have the question read back.

The Witness: Will you read the question?

The Court: The reporter will read the question.

Mr. Gantt: Will the reporter read the question?

(Whereupon, the following was read by the reporter: "Q. Now, at the time you wrote this letter of June 9, 1953, did you know that Seattle Foundry had written such a letter to Seattle Foundry, or to W. R. Grace and Company?")

A. No.

Q. (By Mr. Gantt): If you had known that such a letter had been written by Foundry to Grace and Company about the time that they entered into an agreement to furnish billets, would that have changed your letter of June 9, 1953?

Mr. Morrow: Objected to as immaterial. The letter speaks for itself.

The Court: Objection overruled.

A. My answer to that is that, of course, it would have changed my letter. [894]

Q. (By Mr. Gantt): And is it a fact that you did not know at the time of the letter of June 9, 1953, what the—that Grace and Company—no, that

(Testimony of Parker M. Robinson.)

Foundry contended it had been hired to furnish cast steel billets?

Mr. Morrow: Objected to as leading.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. And is it a fact that you did not know at the time of the letter of June 9, 1953, what the—that Grace and Company—no, that Foundry contended it had been hired to furnish cast steel billets?"')

A. I had had no contact with the Foundry.

The Court: Just a minute.

Mr. Gantt: I will withdraw the question, your Honor; I will withdraw the question.

Q. (By Mr. Gantt): You testified that you were with Pittsburgh Testing Laboratory and came to work with them in 1956 as District Manager of the San Francisco office—1946—correct?

A. Correct.

Q. And so you worked for them for approximately nine or ten years——

A. (Interposing): Yes. [895]

Q. (Continuing): ——that capacity?

In your years of work at Pittsburgh Testing Laboratory, have you had occasion to inspect and test products for your customers to comply with only a portion of ASTM specifications?

A. Yes, many times.

Q. Can you give us an example?

A. Well, we had an example very recently.

(Testimony of Parker M. Robinson.)

An order came to us from a large engineering and contracting company to inspect some alloy steel pipe. That is stainless steel pipe.

There was a shipment consisting of six-inch and ten-inch diameter pipe, which was at that time in the storage yard of a large oil refinery in the San Francisco Bay area.

Now, their instructions to us were to inspect that pipe in accordance with ASTM specification A-158 to determine chemical composition, and a visual inspection to determine the condition of the pipe of the surface.

Now, there are many other things in that inspection such as hydrostatic tests, flattening tests, tensile tests, bend tests, all of which would apply to that pipe from that specification; but the customer only asked us to inspect for certain qualities.

I think another good example is a very—has [896] a very wide range in that case, and that is the specification of concrete aggregates, that is, sand and gravel.

Now, the ASTM specification which that covers tests and inspects for grading analysis. That means the size, grading, specific gravity, organic material in the sand, silt and clay, soft particles, tests for abrasion, tests for soundness, tests for mortar making qualities, tests for alkali reactivity, and for maybe more. That is as far as my memory will serve.

However, I would say in 99 cases out of 100 we are called upon by structural engineers or architects

(Testimony of Parker M. Robinson.)

or building inspectors to test for only certain portions of that specification, although they definitely refer to that specification.

I think those are two good examples, and there are many more.

I would say offhand that a very large percentage of our work involves only a part of an ASTM specification, and I think that is perfectly logical when you realize that one of the principal functions of ASTM specification is the, is to provide an understanding between purchaser and supplier of what they are getting, and in many cases such contracts for purchase are made in accordance with the specification without any inspection being made at [897] all.

It is really up to the purchaser as to what inspection he wants, and how much.

Mr. Gantt: Your Honor, excuse me just one minute.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Mr. Robinson, handing you what has been marked for identification as Defendant's Exhibit No. A-17, will you state whether you are familiar with that, or not?

A. Yes, this is a letter which I wrote to Mr. Johnson in our Seattle office on August 13, 1952. I remember that.

Q. Is this just a copy of that letter?

A. That is our office copy on yellow paper, yes.

Q. A carbon copy? A. Yes.

(Testimony of Parker M. Robinson.)

Mr. Gantt: I will offer this, your Honor. I don't think there is any objection to it.

Mr. Savage: No objection.

Mr. Morrow: I have no objection to it.

The Court: What is the number of that?

Mr. Gantt: It is No. A-17.

The Court: May I see it?

(Whereupon, there was a slight pause, and counsel handed document to the Court.) [898]

Mr. Gantt: That is another carbon copy, your Honor.

Q. (By Mr. Gantt): Can you state in what connection this letter was written?

A. There was some question about the chemical content of certain heat numbers, and this asked for a recheck on the carbon content of certain heats.

Q. And you just passed that information along?

A. Just passed that information along so that it could be complied with. [899]

\* \* \*

Q. Now, Mr. Robinson, you have read Exhibit 21. I think you testified that you received that letter from Mr. Gips dated May 21st? [904]

A. Yes.

Q. Is that correct? A. That is correct.

\* \* \*

Q. Now, Mr. Robinson, will you refer to paragraph 13(b) of the specification, please, and will

(Testimony of Parker M. Robinson.)

you state whether Pittsburgh, as an inspection agent, as an inspector under these specifications, is authorized to accept the product on behalf of its customers without further authority?

A. My answer to that is no, and I would like to [905] clarify that, or explain it a little.

The Court: You may explain it, if there is no objection.

A. (Continuing): Our province in inspecting and testing is to make that inspection and test in accordance with our customer's instructions and to report our results.

We do not accept that material without qualification because the customer always reserves the right to reject it at a later date if something is found to be defective, which could not be found in the original inspection, as is shown in—that is what is provided therein—Section 14(b) of this particular specification.

Q. (By Mr. Gantt): I hand you Plaintiff's Exhibit No. 34, and refer you to the first sentence thereof, being the letter of July 22nd to Mr. Gips of the Seattle office.

Will you read that?

A. It says:

“Upon receipt of your TT we sent you our agreement and instructed you to order the representative of Pittsburgh Testing Laboratory to approve for shipment the 8 billets in which manganese content ran higher than specifications for these billets indicated.”

and admitted as Plaintiff's Exhibit 47, being a letter from Mr. Gips to Pittsburgh Testing Laboratory, (Testimony of Parker M. Robinson.)

End of the sentence. [906]

The Court: That is Gips to whom?

Mr. Gantt: To W. R. Grace, in Seattle. It came to Mr. Vanderbilt's attention, and Mr. Schlaugh's attention.

(Whereupon, there was a brief pause.)

Mr. Gantt: Excuse me just a minute.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Mr. Robinson, handing you what has been marked Defendant's Exhibit—Plaintiff's Exhibit 20, being a letter of May 16, 1952, from W. R. Grace and Company to Seattle Foundry Company, I ask you when was the first time you saw that letter or a copy of that letter?

A. Not until after the claim had been made.

Q. In that connection I hand you what is marked attention Mr. Robinson, dated June 4, 1953.

Have you—did that letter come to your attention?

A. Yes, that came to my attention. There are my initials.

Q. When did you receive that letter?

A. The receiving stamp says June 5, 1953.

Q. And will you read the letter, please? [907]

A. It is addressed to Pittsburgh Testing Laboratory, attention Mr. Parker M. Robinson, from Mr. Gips.

“With reference to our letter of May 22 and tele-



(Testimony of Parker M. Robinson.)

phone conversation with your Mr. Clark, we hereby enclose copies of the following original documents:

“1. Offer made by Seattle Foundry Company, Inc., dated May 2, 1952.

“2. Offer made by Seattle Foundry Company, Incorporated, dated May 13, 1952.

“3. Purchase order of W. R. Grace and Company, Seattle, dated May 16, 1952.

“We are awaiting your reports at the earliest opportunity.”

Q. And it is your testimony that you did not see this letter of May 16th from Grace to Foundry, being Exhibit 20——

Mr. Morrow (Interposing): Object to.

Q. (By Mr. Gantt, continuing): ——until you received this letter?

Mr. Morrow: Object to the form of the question, and repetition. He went into that subject before.

The Court: Objection overruled. It may be repetition, but he may answer.

A. The answer is no. [908]

Q. (By Mr. Gantt): Is the San Francisco office of the Pittsburgh Testing Laboratory licensed to do business in California as a firm of consulting engineers?      A. No.

Q. Did you hear the testimony of Mr. Hargos and Mr. Hartman and Mr. Williams that there is no such thing as a cast steel billet?

A. Yes, I heard the testimony.

Q. Do you agree with those witnesses?

A. No, I do not.

(Testimony of Parker M. Robinson.)

Q. What is a cast steel billet?

A. A cast steel billet is a steel casting in the shape and size of a billet which can be of rather wide range but it is for the purpose of furnishing material to a forge shop for further forging.

Mr. Morrow: May I have that answer repeated, please, by the reporter?

The Court: The reporter will read the answer.

(Whereupon, the following was read by the reporter: "A. A cast steel billet is a steel casting in the shape and size of a billet which can be of rather wide range but it is for the purpose of furnishing material to a forge shop for further forging.") [909]

Q. (By Mr. Gantt): Is it only for forging, or might it be for rolling?

A. It could be for rolling, but it is usually for the purpose of forging, because it is usually used by the smaller forge shops.

At times when there is a shortage of steel and they cannot get the rolled billets.

Q. I hand you Exhibit B-1, being page 2-24 of Kent's Mechanical Handbook, and with reference to the portion of A-17/29, what is indicated by the words in Kent's Handbook there?

A. Well, it says here in the left-hand column, A-17/29, and the next column which is headed "material," it has, "Carbon steel and alloy steel blooms, billets and slabs for forgings."

Q. With reference to A-17/29 specifications

(Testimony of Parker M. Robinson.)

which you have in Exhibit 56, does the title of ASTM A-17/29 indicate that the billets are for forging also?      A. That is correct.

Q. And what does it state there?

A. "Standard specifications for carbon steel and alloy steel blooms, billets and slabs for forgings."

Q. Mr. Robinson, assume that you are in the inspecting business and that you have an order to inspect [910] certain billets, slabs or blooms that are in a steel jobber's yard in San Francisco which had been manufactured previously in the East—for example, in Pittsburgh or Youngstown, Ohio—what portion of the requirements of A-17/29 could you inspect for under those circumstances?

A. Well, it is quite obvious that——

Mr. Morrow (Interposing): May I interpose an objection?

It seems to me that this question is immaterial. The particular product here certainly was not in San Francisco, and the hypothetical question does not involve any facts of this case.

The Court: In what respect are the facts analogous?

Mr. Gantt: Well, I will withdraw the question.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Mr. Robinson, have you ever met Mr. George Mahoney of W. R. Grace and Company, San Francisco?      A. Yes; yes.

Q. When did you first meet Mr. Mahoney?

(Testimony of Parker M. Robinson.)

A. I first met Mr. Mahoney after the controversy about this case arose and he came to my office for a conference, together with a Mr. Wallace, who, I understand was a lawyer for the Grace Company; and in that conference [911] there was also Mr. Emmett from our Pittsburgh office, and Mr. Ruby and myself, and that was the first time I had met Mr. Mahoney. That was in—I wrote a letter shortly after that. It was January, 1954, I believe.

Mr. Gantt: Exhibit 37, please.

(Whereupon, document was handed to counsel by the Clerk.)

Q. (By Mr. Gantt): Mr. Robinson, I will hand you Plaintiff's Exhibit 37, previously admitted, and I ask you to state what those are?

A. This is an invoice from Pittsburgh Laboratory to W. R. Grace for the services rendered.

Q. Where was that invoice prepared?

A. In Pittsburgh.

Q. Did you see it prior to its being sent out?

A. No.

Q. The billing, in other words, was done by your Pittsburgh head office—main office?

A. That is right.

Q. And not by the San Francisco office?

A. No.

Q. And not by the Seattle office? A. No.

Q. How is the billing prepared—the [912] invoice—prepared? From what is it made up?

A. The Accounting Department.

(Testimony of Parker M. Robinson.)

Mr. Morrow: Just a minute.

Q. (By Mr. Gantt, continuing): If you know?

Mr. Morrow: I think it should be qualified. He indicated it wasn't under his supervision. If prepared at Pittsburgh, I don't see how he could know how this was prepared.

The Court: I don't know whether he does or not.

Q. (By Mr. Gantt, continuing): Do you know how this invoice was prepared?

A. I know the information from which it was prepared, yes.

Q. What is the informatioin from which it was prepared?

A. We make out time cards for each man in our employ, and those time cards show the job number and the name of the company, the client for whom that work is being done. Therefore, every bit of time and expense of that man going to and from the job is shown on those time cards, and it is from that that they get the time and expense and the analysis, if we did it in our own [913] office.

It would be based on our reports—the Accounting Department would pick up these various reports and then bill for each one at a standard price.

If it is done by an outside laboratory, such as was the case here, they would pick up that information from the bill which was rendered by the outside laboratory to the Pittsburgh office for the services rendered. That is how that bill was made up.

Q. Where was the chemical analysis done here?

(Testimony of Parker M. Robinson.)

A. It was originally intended that we should do it in San Francisco because of the fact that our Seattle office does not have a chemical laboratory. However, there were certain disadvantages to that, particularly from the Foundry's standpoint, that they would be delayed in getting the results; and it was requested that we arrange to have those samples analyzed in Seattle and that was done by making arrangements with the Northwest Laboratory.

Q. Mr. Robinson, did you ever meet Mr. C. G. Gips of the Grace and Company? A. Yes.

Q. When did you meet Mr. Gips first?

A. Well, our telephone information from Gips that came to our office through Mr. Clark was on May 16, 1952. [914]

Within a week or ten days after that, I paid a visit to Mr. Gips to become acquainted with him, and thanked him for the order, and, realizing that Grace and Company were a large exporting company, I explained to him what other types of service we might render to him on various things they were purchasing for foreign customers.

Q. Now, at the time of your visit to Mr. Gips, did he show you Plaintiff's Exhibit No. 1, being a letter of April 3, 1952, from Grace, Washington office, to Grace, San Francisco office? A. No.

The Court: That is No. 2?

Mr. Gantt: It is No. 1, your Honor.

Q. (By Mr. Gantt): And at the time of your visit with Mr. Gips, did Mr. Gips show you the

(Testimony of Parker M. Robinson.)

purchase order which is Exhibit No. 11, Grace's purchase order from the New Zealand Government?

A. Definitely no.

Q. And at the time of that visit with Mr. Gips, did he tell you that the billets were to be used for railroad—for locomotive parts? A. No.

Q. Or for coupler heads?

A. There was no discussion about the use of the [915] billets at all.

Mr. Gantt: That is all, Mr. Robinson.

The Court: Before you go on, did you say you met with Mr. Gips—when, Mr. Robinson?

The Witness: I can't say exactly. I would say it was within one week or ten days after the May 16th date.

Mr. Savage: If the Court please, I would like to cross-examine for Seattle Foundry in Pittsburgh versus Seattle Foundry, if I may.

The Court: All right. Do you wish to——

Mr. Morrow: Yes, I will develop my cross-examination.

#### Cross-Examination

By Mr. Savage:

Q. Mr. Robinson, I believe you testified on direct examination that you have been a member of the American Society of Testing Materials since 1950; am I correct? A. That is correct.

Q. And that the Company had been a member for over 30 years? A. 50 years.

Q. 50 years. Now, at the time that you had

(Testimony of Parker M. Robinson.)

these [916] conversations with the representatives of Grace and Company, did you have the ASTM 17/29 specifications in the office?

A. I did not have the conversations personally with Mr. Gips of the Grace Company.

Q. Well, who had them—Mr. Clark?

A. Mr. Clark had the conversations with him.

Q. At that time did you have the specifications in the office?      A. Yes.

Q. Now, would it be similar to Exhibit Number 56, Plaintiff's Exhibit 56, or would it be a later or older edition?

A. 1939 edition was the one that we had.

Q. Now, then, does the ASTM issue pamphlets keeping these volumes up to date from time to time?

A. Yes.

Q. Or do they make out new volumes?

A. They do both.

Q. They do both?

A. If a tentative standard is made in between the three-year period, that is distributed, and then when the new volume comes out, that is included in the new volume.

Q. Now, then, would you say that your [917] office contained all the volumes which brought ASTM specifications up to date?

A. Yes, I think it did.

Q. In 1952, I mean?      A. I think it would.

Q. Now, is it a practice to have your branches—require them to have copies of the ASTM specifications, as well as any pamphlets or a later volume?



(Testimony of Parker M. Robinson.)

A. We are a branch. We are not the main office.

Q. Well, then, would you say that the Seattle office had the specifications?

A. I have no idea. I don't know anything about the Seattle office.

Q. Is each branch a law unto itself?

A. Each branch has certain kinds of work which they do, and which requires that they keep certain specifications, or have equipment to do it.

Now, for instance, we do a lot of work in San Francisco which Seattle is not equipped to do. There are various things in Pittsburgh that they can do and which we cannot do in San Francisco, so that each office has its own bailiwick and things that they do in that.

Q. Will you tell the Court what percentage of your work is predicated upon ASTM specifications, and what [918] is not, roughly speaking?

A. That would be a very hard thing to answer. Certainly a great deal of it is predicated upon ASTM specifications, but on the other hand we do a great deal of work also on government specifications.

In some cases, without any specifications at all, just the specifications of the particular purchaser. For instance, I will just give you a rough example.

We will sample and analyze a lot of iron ore going to Japan. Now, the customer in this country, who in this case is the supplier, gives us the requirements of what he wants to have done, and he tells us, "You shall sample as it goes on the ship, you shall take

(Testimony of Parker M. Robinson.)

that sample and make certain analyses from it and report your results.”

That has nothing to do with ASTM, and, of course, a great many others are similar to that. ASTM is not the only source of specifications.

Q. I understand that. I am asking you if a large percentage of your work is not based upon that, generally speaking?

A. A large percentage is, but I wouldn't say whether it was a majority of it.

Q. Would that answer apply to other branches, or are other branches relying on it less? [919]

A. It would vary.

Q. It would vary. Now, with reference to Defendant's Exhibit A-1, I believe you testified those were the notes of Mr. Clark?

A. That is correct.

Q. And at that time did you have any contact with the representatives of Grace and Company insofar as the terms of the agreement was between Pittsburgh and Grace?

A. I did not, personally, no.

Q. All you testified was as to the notes of Mr. Clark? A. That is right.

Q. Now, when was the first time it came to your knowledge, other than through these notes, that the Seattle office was to inspect in accordance with the ASTM specifications 200 tons cast steel billets?

A. I just don't get the meaning of that. I got information from Mr. Clark verbally that he had had this telephone order from Mr. Gips.

(Testimony of Parker M. Robinson.)

Q. And who passed it on to the Seattle office?

A. Mr. Clark. He passed it on by telephone and by letter.

Q. I have a letter here, A-6, signed by yourself. You signed that letter?

A. That is right. [920]

Q. That is dated what date? A. May 21st.

Q. And I am handing you A-7. Is that the inter-officer order which was sent at that time?

A. Yes, this is our internal work order that we send copies to Pittsburgh and we send copies to the branch which is going to do the work.

Q. Then at the time you sent out your letter of May 21st, A-6, Defendant's, with the order enclosed, you then had no personal contact with the arrangements so far as the contract between Grace and Pittsburgh was concerned?

A. No. I had no personal contact.

Q. However, you did testify when this letter and the order with it went to the Seattle office that the 200 tons cast steel—now, correct me if I am wrong—indicated upon its face because it referred to cast steel that the ASTM specification 17/29 did not refer to rolled or forged billets, is that correct?

A. You mean that I testified to that?

Q. You testified, yes; that is my understanding. That this, the key information as contained in this order to the Seattle office was cast steel billets?

A. That is correct.

Q. And that in itself indicated that the [921]

(Testimony of Parker M. Robinson.)

ASTM 17/29 specification was not to require forged or rolled billets; is that correct?

A. I wouldn't say that that was the only factor that indicated it.

We had already notified our Seattle office——

Q. (Interposing): When?

A. (Continuing):—— by phone call by Mr. Clark.

Q. At what time? A. On the 16th.

Q. On the 16th?

A. And he followed it with a letter of the 17th, giving them——

Q. (Interposing): What was the conversation; do you know what the conversation was?

A. I don't know; you will have to ask Mr. Clark that.

Q. All right. It was then followed with a letter. Go ahead.

I gather from what you said in testifying as an expert and as a non-expert—correct me if I am wrong, I am a little fuzzy—that because the order and the letters and the notes of Mr. Clark referred to cast steel billets that that reference in itself excluded forgings or rolled billets; am I correct in that?

A. I would say that the whole thing has got to be [922] taken together.

Remember this: that this internal order of ours is to keep our records straight. There is a number, S.F. 5799, given to this particular job, so that our Pittsburgh Accounting Department and the Seattle office

(Testimony of Parker M. Robinson.)

who make out the time cards against it would show, and it can all be tied in with that one order number.

Q. Well, let me ask you——

A. (Interposing): That is the prime purpose. It is internal only.

Q. Let me ask you this: In this internal order it refers to 200 tons cast steel?

A. That is right.

Q. Does that, under the specification therein set forth, require rolled or forged billets? A. No.

Q. Why doesn't it?

A. Because our instructions from the client were that they were to be cast steel billets.

Q. And did this pass on the information to your Seattle office?

A. Yes, it did, and not only that, but previous telephone conversations and letters did.

Q. Well, then, did the previous conversations and letters ahead of that order exclude the rolled or [923] forged, or does this order itself?

A. Both.

Q. How? Tell me how. Explain to me.

A. You ask Mr. Clark what he told Mr. Johnson on the phone. I don't know anything about Mr. Clark's conversation.

Well, he will be on the stand here.

Q. I know, but you tell me.

The Court: Mr. Robinson, you should attempt to answer the question as best you can. If you cannot, you can so state.

The Witness: Okay.

(Testimony of Parker M. Robinson.)

A. I did not hear Mr. Clark give that phone instruction to Seattle.

Q. (By Mr. Savage): Now, I might be wrong about this, but I understood you to testify that when these letters and orders were sent to the Seattle office, that the order itself, referring to 200 cast steel, was sufficient to inform them that they were not to inspect rolled or forged steel; am I wrong?

A. I think that that would be a reasonably correct assumption.

Q. Reasonably correct? A. Yes. [924]

Q. So that now, let me ask you, then: Did you at any time prior to this letter of May 21st, which you signed, Defendant's Exhibit A-6, and the order accompanying it, have any information covering the contract between Grace and Foundry? A. No.

Q. Had anybody informed you orally of what that contract was? A. Not me.

Q. Had anybody written you a letter or showed you a copy of any contract before that letter went out? A. No.

Q. You knew nothing about it at all?

A. Nothing.

Q. Now, as an expert, if at the Seattle Foundry they endeavored, after you had given the instructions to the Seattle office, to deliver to Pittsburgh rolled or forged steel billets, would they have been acceptable under your instructions to your Seattle office?

A. We would have immediately gone back to the

(Testimony of Parker M. Robinson.)

source of our information, Mr. Gips, and asked for further instructions.

Q. Let's suppose you couldn't go back, and answer the question: Would you accept them under that order?      A. No. [925]

Q. Therefore, your order of 200 tons cast steel billets was given before you ever knew anything about the contents of any agreement between Grace and Seattle Foundry—correct?

A. Except for one thing.

Q. What one thing?

A. Mr. Clark in his telephone conversation with Mr. Gips was told that cast steel billets were ordered, and Mr. Clark told that to me.

Q. But outside of that, neither you or Mr. Clark had a copy of the contract?      A. No.

Q. And were not informed of the details of the contract?      A. No.

Q. Now, then, would you take Exhibit 56, there, and read to me paragraph 3?

A. Paragraph 3 states that:

“Billets shall be purchased as semi-finished, rolled or forged material.”

Q. Now, as an expert if you desired to have your Seattle office inspect cast steel billets according to ASTM 17/29, wouldn't it have been simpler to have said, “Inspect according to ASTM 17/29 excepting therefrom paragraphs so-and-so and so-and-so”?

A. No, I don't think that was the simplest way to do it. The simplest way to do it was to say, “Inspect in accordance with the chemical speci-

(Testimony of Parker M. Robinson.)

fications of A-17/29 and inspect for visual surface defects, and for the size," of course. The size is not mentioned in the ASTM A-17/29 specifications. That is something which the customer gives us. They have ordered certain sizes. "See that we get them. Inspect to see that they are that size."

Q. Now, did you ever inquire of your Seattle office whether they had the specification ASTM A-17/29?

A. Mr. Clark had the telephone conversation with the Seattle office. I did not hear that conversation.

Q. Do you know now whether at that time they did have a volume containing the specification ASTM?

A. I know now, according to what I have heard, that they did not have in their office a copy of that specification.

Q. Did they ever make demand upon you for the specification to be sent from the San Francisco office to Seattle?      A. Not to my knowledge.

Q. As a matter of fact, they didn't need it when they were only going to inspect cast steel billets, did they?

A. That is the way we felt, that they didn't need [927] it because we gave them all the parts of the specifications that they needed.

Q. And if they didn't have a copy, would they from memory know what all the paragraphs from 1 to 15 were?

A. Most certainly not. There are hundreds and



(Testimony of Parker M. Robinson.)

maybe thousands of ASTM specifications, and unless you are currently using one particular specification, you certainly cannot remember what the paragraphs are, and what they say.

Q. And no inquiry, so far as you know, was made back from the Seattle office asking for the complete specifications?

A. Not that I know of.

Q. I believe you testified that as to the letter of May 16, 1952, from Grace and Company to Seattle Foundry you had never seen that until after the dispute arose; is that correct?

A. No, I had never seen it.

Mr. Savage: That is all. [928]

\* \* \*

### Cross-Examination

By Mr. Morrow:

Q. Mr. Robinson, you have been the manager of the Pittsburgh Testing Laboratory in San Francisco since 1946, haven't you?

A. That is right. [930]

Q. And you are a graduate and hold college degrees—Bachelor of Science degree in Mechanical Engineering? A. Yes.

Q. And you took post-graduate work at Yale in Mechanical Engineering? A. That is right.

Q. And you are a licensed engineer in California, Oregon and Utah? A. That is right.

Q. You are also a member of the A.S.M.E. Society?

(Testimony of Parker M. Robinson.)

A. American Society of Mechanical Engineers.

Q. Mechanical Engineers; and you are a member of the Society of Naval Architects and the Marine Society, is that it? A. Yes, that is correct.

Q. Now, what are those societies?

A. Now, the American Society of Mechanical Engineers is as its name implies.

Q. Is that the largest? Have you finished?

A. Well, it is the mechanical engineers.

Q. Is that the largest society of mechanical engineers and to which most of the important mechanical engineers belong?

A. It is the only society of mechanical engineers that I know of. [931]

Q. I see.

A. There are certain branches that might be called mechanical engineers in general; petroleum is mechanical engineering, but it has become such a large unit that they now have their own association. The same is true of industrial engineers. They are mechanical engineers but they have become so numerous that they have had their own association.

Q. How long since you practiced the art of mechanical engineering?

A. I have been practicing right up to the present time.

Q. You practice it in your present profession, do you? A. Yes.

Q. Now, you are also a member of the American Concrete Institute, is that correct?

A. That is correct.

(Testimony of Parker M. Robinson.)

Q. Are you an active member in that association?

A. I am not on any committees, no.

Q. Well, are you active in attending the meetings?

A. Not very. You see, they have committee meetings, and then maybe a yearly convention. They don't have any local meetings.

Q. Do you attend—pardon me. [932]

A. As other societies do.

Q. Do you attend meetings of these various societies which you belong to? A. Yes.

Q. Regularly? A. Not regularly, no.

Q. Now, you state that you have been a member of the ASTM since 1950. What kind of a member are you with ASTM?

A. Primarily to get all of the information that we need to conduct our business.

Q. Do you know whether Mr. Johnson of the Seattle office is a member of the ASTM?

A. I do not know that.

Q. Are you a member of any committees of the American Society for Testing Materials?

A. No.

Q. You are not then specifically a member of the A-1 Committee on Metals, are you?

A. No, we have a man from the Pittsburgh office who is on that committee.

Q. Do you belong to any metallurgical societies?

A. No.

Q. Do you profess to be especially skilled in metallurgy? [933] A. No.

(Testimony of Parker M. Robinson.)

Q. Do you profess to be sufficiently proficient in metals and metallurgy to define terms with respect to metal?

A. Yes, because I have used metals in engineering, the engineering profession, and I would have to know the terms, and I have been through many steel mills and many foundries and many rolling mills and forge shops, so that I know in general how materials are used, and the general nomenclature.

Q. I see. Then, when you read the definition from Henderson's Metallurgical Dictionary, it wasn't necessary, was it, for you to refer to that in order to obtain a definition of the word "billet"?

A. No. My idea of a billet, as I knew it before I looked in there was very similar, but he put it in better words than I would.

Q. Yes; and, by the way, there is no definition in Henderson's in respect to a cast steel billet?

That term, or combination of terms, is not defined in Henderson, is it?

A. Yes, the very first definition is a casting.

Q. All right. Would you then—let's refer to that.

"Castings: Metallic objects formed by [934] pouring molten metal into a mold, as in gravity casting, or by forcing highly plastic metal into a die, as in pressure casting. Castings are generally classified as ferrous or non-ferrous."

A. That is correct.

(Testimony of Parker M. Robinson.)

Q. "They are further classified as to the type of mold used as, for example, permanent mold, sand mold, etc., and also as to the special processes used, such as die casting, precision casting, etc."

Now, is it your contention, Mr. Robinson, that under this term "Casting" is included a definition of the term "cast steel billets"?

A. A billet can be cast just the same as any other kind of a casting.

Q. I understand that is your contention, but that doesn't answer my question.

The question is, or was, first:

Is there a definition of the combination of terms in Henderson's Metallurgical Dictionary, "cast steel billets," and your answer was, "Yes, it is under the term 'castings,'" if I recall your testimony correctly.

Now, I am asking you whether you are quite certain, after I read the definition, that this definition refers equally to the term "cast steel billets"?

Mr. Gantt: If the Court please, I believe [935] counsel has misinterpreted what the witness said.

He asked the witness—counsel asked the witness—if a cast steel billet is included under the definition of the word "billet," and Mr. Robinson said the first definition under the word "billet" is the definition of a casting or refers to a casting, as it does in the definition of the word "billet" in Henderson's, which Mr. Robinson read on direct examination.

The Court: The witness, I assume, can follow the

(Testimony of Parker M. Robinson.)

questions, and he may point out such differences if he thinks they are material.

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Now, I don't know—I don't recall whether there was a question before you or not, presently, Mr. Robinson.

The Court: I believe there is a question.

A. Well, maybe I can——

The Court (Interposing): Just a moment, Mr. Robinson. We will see if there is a question.

(Whereupon, the following was read by the reporter:)

“Q. I understand that is your contention, but that doesn't answer my question. The questions is, or was, first: [936]

“Is there a definition of the combination of terms in Henderson's Metallurgical Dictionary, 'cast steel billets,' and your answer was, 'Yes, it is under the term "casting,"' if I recall your testimony correctly.

“Now, I am asking you whether you are quite certain, after I read the definition, that this definition refers equally to the term 'cast steel billets'?”

The Court: Do you understand the question, Mr. Robinson?

The Witness: Yes, I understand the question and I think I can answer it this way:

A. (Continuing): The term “casting” is a generic term used whenever you pour molten metal into a mold, and a term “billet,” refers to a certain

(Testimony of Parker M. Robinson.)

general size and shape of a piece of metal. Therefore, a cast steel billet is a billet that is of a certain shape and size which has been cast by pouring molten metal into a mold.

Does that make myself clear?

Q. (By Mr. Morrow): Well, I don't know whether you have answered the question or not.

Now, let me put the next question to you, which can be answered either yes or no. [937]

Are the terms "cast steel billets" defined in Henderson's Metallurgical Dictionary?

A. No.

Q. They are not? A. Not as such.

Q. Now, the term——

A. (Interposing): May I say one more thing there?

Q. Yes, you may.

A. You will find it in the technical literature, the name, "cast steel billet."

Q. But you are unable to state where?

A. Yes, I could; I could definitely state where. If you refer to the "Iron Age," August 19, 1948, you will see a complete description of "cast steel billets" made by continuous casting process which has been developed by the Pittsburgh Steel Corporation and the Babcock and Wilcox Boiler Company.

Q. Well, that may be so. Previous information from your superiors in answer to interrogatories was that there was no such definition in any techni-

(Testimony of Parker M. Robinson.)

cal work, and that was all I was going on, Mr. Robinson.

A. Well, I can show it to you, if you want to see it.

Q. Yes. Now, Mr. Robinson, the term "casting," as defined in the Metallurgical Dictionary by Henderson [938] refers to castings, generically, classified as ferrous or non-ferrous, and I would like to ask you if you recognize the difference in the ferrous and non-ferrous field of metallurgy? A. Yes.

Q. So that in defining a billet is it not necessary, Mr. Robinson, for you to first of all consider whether or not you are dealing in the ferrous or non-ferrous field?

A. That is correct. It is correct for this reason: that a billet in the non-ferrous field is usually a smaller size than in the ferrous field.

Q. Well, isn't it true, Mr. Robinson, that the definition one of a billet, given of a billet from Henderson's Metallurgical Dictionary, "any solid metal casting of cylindrical, square or rectangular shape," refers to the non-ferrous industry?

A. No, it refers to both.

Q. All right; isn't it true, then, that (2) defining a billet in Henderson's Metallurgical Dictionary is as follows:

"A rectangular semi-finished rolled ingot with cross-section of from four to thirty-six square inches, having a width less than twice its thickness" refers to the ferrous industry? [939]

A. That is right.



(Testimony of Parker M. Robinson.)

Q. So isn't it reasonable to conclude that the definition, the second definition of a billet is the one which is to be used when you are considering the term billet in connection with the ferrous industry?

A. No.

Q. Are you familiar with the Metals Handbook published by the American Society for Metals?

A. Yes.

Q. Are you familiar with the fact that in the definition of billet there there is a distinction between the ferrous and non-ferrous industry?

A. Yes.

Q. And isn't it true that in the Metals Handbook definition for billet it refers to a rolled material?

A. Well, I would have to see it to know what you are talking about.

Q. Do you mind if I come up here?

The Court: Sure; sure.

Q. (By Mr. Morrow): In the definition—I am referring you to the Kent's Handbook, 1948 edition of American Society for Metals—now under the definition, the first definition of billet, what are the words that follow? A. Well—— [940]

Q. (Interposing): Just answer the question.

The non-ferrous metallurgy—isn't that correct?

A. You are referring to a billet in the non-ferrous, that is what it applies to here.

Q. All right; now, will you read the billet in the non-ferrous metallurgy definition?

(Testimony of Parker M. Robinson.)

A. Get your finger out of the way so that I can see.

Q. I am sorry.

A. Non-ferrous metallurgy, one, this is the definition of a billet in the non-ferrous—that means brass, bronze, copper.

“A section of ingot hot-worked by hot forging, rolling or extrusion.”

“2. A casting suitable for rolling or extrusion.” So that even in your non-ferrous, you have both the casting and the rolled or forged product named a billet.

Q. And that was your testimony in connection with Henderson's Handbook, that the first definition could refer to the non-ferrous metallurgy?

A. No, I said it could refer to both.

Q. All right.

A. Because it does not limit it. In here it is limited because it says it is non-ferrous. This limits [941] it to non-ferrous, whereas Henderson made a general statement that his first definition is that it is a casting, and he didn't say whether it is ferrous or non-ferrous, so that it applies to both.

Q. Now, will you refer to the definition of billet in the Metals Handbook, with respect to the ferrous industry; and what does it say?

A. It doesn't say.

Q. Well, what does it say?

A. There is nothing in here regarding ferrous industry.

Q. I call your attention—I can understand why

(Testimony of Parker M. Robinson.)

I was trying to keep my hand on it—here is the first word, billet, here is the next word, billet, and opposite that it says “ferrous metallurgy,” does it not? A. You are right.

Q. And “see bloom.” A. “See bloom.”

Q. That is for the ferrous metallurgy, is it not?

A. In this particular catalogue it is.

Q. Yes. A. This particularly dictionary.

Q. Now, how is a bloom defined in the Metals Handbook?

A. “Bloom, slab or billet, in ferrous [942] metallurgy semi-finished products hot-rolled from ingots and rectangular in cross-section with rounded corners. The chief differences are in the cross-sectional area.”

They mean by that, between a bloom, a slab and a billet.

“In ratio to width, to thickness, and in the intended uses. The American Iron and Steel Institute, Steel Products Manual, Section 2, classifies general usage thus.”

And it gives particular sizes of a bloom and a billet and a slab.

Q. Thank you. Now, Mr. Robinson, will you give me your definition of a cast steel billet?

A. A cast steel billet is a billet of a size specified which is cast by pouring hot molten metal into a mold and is used by forge shops for further processing by forging operations, or it could be machined from its original casting dimensions into a product, final product.

(Testimony of Parker M. Robinson.)

Q. Do you recognize this definition of a cast steel billet, that the term billet refers to a semi-finished forged or rolled material?

A. That is one definition of it, yes.

Q. Well, that is usually the definition used by a producer of steel billets, is it not, by a method of pouring steel into ingots and reducing the ingots in size [943] by rolling or forging?

A. I would say this, that the largest number of tons of ingots—I mean billets—is from rolling mill operations which, of course, uses the ingot to start with.

The reason for that is that that is the cheapest way to produce ingots. However, in cases of shortage they are produced in other ways.

Q. Then you agree, do you, Mr. Robinson, that in the greatest number of instances a manufacturer of steel billets uses the term “billet” in describing a product which is manufactured by pouring steel into a cast-iron mold and reducing it in size by rolling or forging to produce the end product?

A. Well, I have said that that is the biggest tonnage, yes.

Q. Well, then, that is the way the term is used in the industry, isn't it?

A. Oh, no. The industry also recognized forged billets. It also recognizes cast billets. You will see that in the technical literature quite frequently.

Q. Do I understand now that so far as terminology is concerned and your understanding that a cast steel billet is a product made into the size and

(Testimony of Parker M. Robinson.)

shape of a billet and which can be rolled or forged?

A. That is correct. [944]

Q. Let me ask you: is a billet cast metal or steel?

A. Is a billet——

Q. (Interposing): Is a billet cast steel?

A. Well, it depends on what billet you are talking about.

Q. Well, any billet?

A. Well, sure.

Q. It is cast steel?

A. Yes.

Q. That is your understanding, that a billet is cast steel, is that correct?

A. That is one kind of a billet.

Q. How would you define the term “steel billet” without the term “cast”?

A. That would mean it could either be rolled, forged or cast.

Q. In other words, a steel billet, as used in the ferrous metallurgical field, is a semi-finished steel product manufactured by rolling or forging an ingot?

A. I don't recognize it as such.

Q. You don't recognize it as such?

A. Not a billet as to that restricted definition, no. [945]

Q. But that is one definition of a steel billet, isn't it?

A. That is one definition, yes.

Q. Well, Mr. Robinson, what is the definition of a steel billet as used by the American Society of Testing Materials?

A. Do you refer to this particular specification, A-17?

Q. No, I don't refer to that one in particular.

(Testimony of Parker M. Robinson.)

I refer to the definition as determined by the American Society of Testing Materials committee, A-1, on Steel.

A. I am not familiar with that definition.

Q. Is it contained in ASTM A-17/29, which you have before you, Plaintiff's Exhibit 56?

A. Well, it says here: "Billets: The term billet as used in this specification is to include bloom, billets, and slabs," and then in number three, "Billets shall be purchased as semi-finished, rolled or forged material."

Q. Now, I believe in your testimony that you said that you had present in your office at the time that the Grace order was placed the specifications and the books put out by the American Society for Testing Materials—is that correct?

A. That is correct. [946]

Q. So that at that time you had in your records and in your library the ASTM designation A-273-44, covering specifications for carbon steel, blooms, billets and slabs for forging; is that correct?

A. Yes, that is the specification which superseded this, so far as carbon steel billets is concerned.

A-274 superseded this specification so far as alloy steel billets is concerned.

Q. Now, will you tell me with reference to Plaintiff's Exhibit 62, which is in evidence and which is a carbon copy of the ASTM A-273-44 T specifications, what the American Society for Testing Materials says with respect to carbon steel billets or what the definition is, I should say.

(Testimony of Parker M. Robinson.)

A. Well, let's see:

“Scope. These specifications cover carbon steel semi-finished rolled or forged blooms, billets and slabs for reforging.”

Q. That is (a). What is the definition under (b)?

A. (b) reads:

“Blooms, billets and slabs are semi-finished steel products hot-rolled or forged from ingots to approximate cross-sectional dimensions. Blooms and billets may be square, round or rectangular in section; slabs are rectangular.” [947]

Q. You need not read any more. The rest refers to sizes.

I will refer you to Plaintiff's Exhibit 63, which has been admitted in evidence as a photostatic copy of A-273-/52 T.

By the way, 52 T refers to the 1952 tentative——

A. (Interposing): It means that it has been tentatively set as in 1952. It hasn't been determined as a fixed specification yet. It is just tentative.

Q. Now, would you compare the definition as set forth in Plaintiff's Exhibit 63 with the definition in Plaintiff's Exhibit 62?

That is paragraph 1.(b); and state whether or not the definition of a carbon steel billet is the same in both exhibits?

A. They seem to be the same.

Q. They are the same; is the United States Steel Company one of the larger manufacturers of steel products?

A. Yes.

(Testimony of Parker M. Robinson.)

Q. Is that company a reliable source of information in respect to the manufacture of steel billets?

A. Yes, particularly the steel billets which they manufacture which are all rolled. They do not manufacture any cast steel billets, because that is [948] something which the smaller forge shops want and buy at a time when they can't get rolled steel billets.

Q. Do you agree, Mr. Robinson, that the United States Steel Corporation, in setting forth in their treatise on the "Making, Shaping and Treating of Steel, Sixth Edition," apparently published in 1951, sets forth in respect to the production of rolling of steel ingots into blooms, slabs and billets a method of manufacture consistent with the definition of a steel billet as follows:

That a steel billet is a semi-finished, rolled or forged product manufactured from a—reduced from an ingot larger in size?

A. Yes, that is correct.

Q. You concede that the United States Steel employs the term "steel billet" in that connection, do you?

A. Yes, yes; that is because they make them from that process.

Q. Mr. Robinson, you have given testimony in connection with Defendant's Exhibit A-1, which you have identified as Mr. Clark's notes, and I will hand it to you here, so that you will have it before you.

Now, do I understand your testimony to be that



(Testimony of Parker M. Robinson.)

Mr. Clark took these notes, and told you that [949] this was the information given him by Mr. Gips of Grace and Company?

A. That is correct, by telephone.

Q. By the telephone? A. Yes.

Q. In referring you to Defendant's Exhibit A-3, do I understand that this Exhibit A-3 is an inter-office communication which was sent to your Seattle office by Mr. Clark in accordance with the information he had received on the phone from Mr. Gips?

A. That is right.

The Court: Is that A-6?

The Witness: Exhibit Number 1, it says.

The Court: On the side there?

Mr. Morrow: A-3, I think it is.

The Witness: Oh, A-3; yes, Defendant's Exhibit A-3.

Q. (By Mr. Morrow): And, do I understand that following that you yourself—and following information you had received from Mr. Clark—you wrote to your Seattle office, Defendant's Exhibit A-6?

This is A-6—your letter of transmittal.

A. Yes.

Mr. Morrow: I wish to read this to the [950] Court, your Honor. It wasn't read before. [951]

\* \* \*

Q. That is the letter you wrote? A. Yes.

Q. And with that you enclosed your formal inspection order, which is Defendant's Exhibit A-7,

(Testimony of Parker M. Robinson.)

did you?           A. That is correct.

Q. And this is the formal order which you included with that exhibit?           A. That is right.

Q. Mr. Robinson, there is a vast difference, is there not, in your own estimation, between what you described as a cast steel billet and a steel billet which complies with ASTM A-17/29 specification?

A. Would you put that question again? I didn't quite get it.

Mr. Morrow: Yes. Will you listen to the reporter? May he read it?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Mr. Robinson, there is a vast difference, is there not, in your estimation, between what you [952] described as a cast steel billet and a steel billet which complies with ASTM A-17/29 specifications?")

A. (Continuing): A cast steel billet is certainly not a forged or rolled billet.

Q. (By Mr. Morrow): Yes. One product is more refined than the other, isn't it?

A. Refined in what way?

Q. By forging or rolling?

A. The chemical constituents could be the same.

Q. Yes.

A. And since it is presumed to be a semi-finished product, it is assumed that it is to be further worked.

Q. Yes.

(Testimony of Parker M. Robinson.)

A. In one way or another, by the purchaser; and in that case they would have the same material.

Q. Well, do I understand, then, from what you have just said, and your previous testimony, that there is little difference in the end product between what you term a cast steel billet and a steel manufactured as per the ASTM A-17/29 specifications?

A. I say this: That you can take a cast steel billet and further roll it and forge it to whatever—to the shape you are going to make it finally, and then [953] there will be no difference whether you start it with a rolled or forged billet, or whether you start it with a cast billet, because you start with a casting to start with, with your ingot.

Q. Yes.

A. So that you have started with cast material in either case.

Q. Yes.

A. So, if you forge it and roll it from the 4 by 9½ shape down to something smaller, you have got practically the same kind of material as if you had forged it down from the size of an ingot.

Q. So then in your estimation there is practically no difference in the finished product between a cast steel billet and a billet conforming to ASTM A-17/29 specifications?

A. Well, now, I am talking about the final product made from a cast billet after it has been further forged or rolled.

Q. I see.

(Testimony of Parker M. Robinson.)

A. Then I say that that is the same material.

Q. Well, we are talking about two different things.

A. I tried to make it clear.

Q. I am talking about the term "cast steel billet" as it was manufactured in this case by the Foundry without [954] any subsequent rolling and forging.

Now, what I am trying to ask you is: Is there any material difference between that product and a product which would be manufactured according to the specification ASTM A-17/29?

A. There would be some difference in the grain structure, but, as I say, that is considered right in the specification as a semi-finished product which is still further finished by further working, and when you do further work it, you have got the same grain structure.

Q. I see. Then I believe in your testimony you said that in manufacturing a cast steel billet that paragraph 3—do you have Plaintiff's Exhibit 56 before you?

A. Yes.

Q. Would not apply, is that correct?

A. That is correct.

Q. And I believe you said that paragraph 4 would apply?

A. Yes. That is open hearth or electric furnace and, therefore, that would apply.

Q. And paragraph 5 does not apply?

A. No.

Q. And paragraph 9(a) you say did not apply?

(Testimony of Parker M. Robinson.)

A. No, that isn't necessary. That is the check analysis by drilling the billets themselves. [955]

Q. Well, now paragraph 3 which you say does not apply in the manufacture of a cast steel billet, doesn't apply, as I understand it, because of the definition there that billets shall be purchased as semi-finished rolled or forged material, is that correct?

A. My answer to that is that it doesn't apply because the specification given to us by the purchaser was that it shall be cast steel billets. Therefore it can't be rolled or forged. That wouldn't apply.

Q. And in connection with paragraph 5, which provides that a sufficient discard shall be made from each ingot to secure freedom from injurious piping and undue segregation, you say that wouldn't apply to the manufacture of cast steel billets?

A. No. Do you want me to give you the reason?

Q. Yes; that would be fine.

A. Discard or cropping is only done if an ingot is rolled down to a smaller size. It is never done in the ingot stage in spite of the other experts that have been in this chair, because some ingots run up to 40 or 50 tons apiece, and might have a cross-sectional area of 2 by 2 and even 3 by 3; and it is conceivable that you might cut that ingot in any economical manner. To cut off the piping, if they did, you would lose a lot of good metal because the piping is in the center. Therefore, cropping [956] is done after that ingot has gone through the rolls

(Testimony of Parker M. Robinson.)

and become a bloom or a billet. Then cropping is done. It is expressed as being from the top end of the ingot. That means it is taken—the discard is cut off the billet or bloom that was at the top end of the ingot because it is where the piping would be.

Q. I see. In this case that couldn't apply, if I understand your testimony, Mr. Robinson, because the so-called billets were poured flat in sand molds?

A. That is right.

Q. And you couldn't cut off the top?

A. You wouldn't cut it off of the casting anyway.

Q. No. Now, in paragraph 6, your testimony was that that did not apply, and that provides that unless otherwise specified the billets shall be made from ingots at least three times the cross-sectional area of the billet, and——

A. (Interposing): That means——

Q. (Interposing): Let me ask the question, will you, sir?

A. Yes.

Q. That particular specification, as I understand your testimony, would not apply because in the casting process you cast according to the required size only?

A. The very wording of it, I think, will answer you— [957] “unless otherwise specified,” and in this case it was specified that they be poured to a certain size.

Q. I see. Well, then, suppose, Mr. Robinson, that the order—you had any order to make an inspec-

(Testimony of Parker M. Robinson.)

tion for steel billets as per the ASTM A-17/29 designation.

Let me ask you: Would it be important in the matter of inspection to see that the manufacturer of the product complied with paragraphs 3, 5 and 6?

A. You are asking me a hypothetical question which doesn't jibe with the facts of the way——

Q. (Interposing): I understand that.

A. (Continuing): ——we had received our order.

Q. I understand that, but will you answer the hypothetical question, Mr. Robinson?

A. Sure; if somebody says billets are to be made strictly in accordance with A-17/29, therefore they would have to be made in accordance with the specifications.

Q. Yes. Now, if you simply had an order to inspect material as per the ASTM specification A-17/29, then your inspection would consist of following the requirements of paragraphs 3, 5 and 6 of ASTM A-17/29?

A. Not if our client had ordered it from a Foundry. It couldn't be.

Q. All right. I am just asking you, [958] regardless of where the matter is ordered from, if it isn't true that if you had an order to inspect steel billets as per ASTM A-17/29, without any qualifications, then the inspection that would be required of you would be to see that paragraphs 3, 5 and 6 were carried out—isn't that true?

A. That is another hypothetical question, but——

Q. (Interposing): I know it is.

(Testimony of Parker M. Robinson.)

A. (Continuing): —which I don't think can be answered correctly without tying it in with the fact that the customer at the time they gave us the order said we were to inspect it at a Foundry.

The Court: Mr. Robinson?

The Witness: Yes?

The Court: These questions are put hypothetically, and you are to assume that. If your counsel thinks the question is objectionable, he will object.

The Witness: Okay.

The Court: So, if you will, answer the question as put, if you are able to, and your counsel will bring out any other matter.

The Witness: Will you read the question for me, and I will try to answer it.

The Court: The reporter will read the [959] question.

Mr. Gantt: Will the reporter read the question?

(Whereupon, the following was read by the reporter: "Q. All right. I am just asking you, regardless of where the matter is ordered from, if it isn't true that if you had an order to inspect steel billets as per ASTM A-17/29, without any qualifications, then the inspection that would be required of you would be to see that paragraphs 3, 5 and 6 were carried out—isn't that true?")

Mr. Gantt: Objection, your Honor, unless it is stated where the inspector is to make the inspection, at a warehouse, at a rolling mill, at a foundry, at



(Testimony of Parker M. Robinson.)

a forge shop, or wherever counsel has in mind. I don't think the question is complete as it is stated now.

The Court: Well, the objection is overruled.

Q. (By Mr. Morrow): Will you answer the question?

The Court: If he cannot answer the question of course he may so state.

A. If the billets were to be made in a steel mill and we were to inspect right through the mill, yes, we could follow that inspection—that [960] specification.

(Whereupon, there was a brief pause.)

Q. (By Mr. Morrow): Well, in other words, assuming that you had an order simply to make an inspection of steel billets as per ASTM A-17/29 specifications, that you could make such—not that you could make such——

Mr. Morrow: Strike that.

Q. (By Mr. Morrow continuing): That the important matter contained in that inspection would be a compliance with paragraphs 3, 5 and 6 of A-17?

A. I would have to qualify my answer as to whether it was done in a steel mill or not.

Q. All right.

A. If our inspection was done in a steel mill, yes; I will answer that yes.

Q. Very well. I will try to phrase my questions so that you will not be involved with where the inspection is made, Mr. Robinson.

(Testimony of Parker M. Robinson.)

In order for a product to comply with ASTM A-17/29, is it important that it be manufactured pursuant to the terms of the specifications and, in particular, paragraphs 3, 5 and 6?

A. Yes, sure.

Q. In other words, those are very [961] important parts of this specification, aren't they?

A. If they are to be rolled or forged billets.

Q. That is what it says, doesn't it?

A. That is what the specification says.

Q. Yes; so that if you had an order for castings or cast steel billets to conform insofar as possible, to ASTM A-17/29, it would be important to consider paragraphs 3, 5 and 6 in order to determine whether or not those would apply?

A. No, they are not applicable in that case.

Q. I know they are not, but that would be an important consideration for you, wouldn't it, as an inspecting institute?

A. If we were asked to—do I get this right—if we were asked to inspect cast steel billets?

Q. Yes.

A. No, it wouldn't apply at all, and we would so tell the client.

Q. It would not apply at all, and you would so tell the client?      A. Yes.

Q. You would have a fair understanding with your client as to what particular parts of this specification would be eliminated in the event of an inspection—in the event you had an order to inspect cast steel [962] billets with a specification ASTM

(Testimony of Parker M. Robinson.)

designation A-17/29, and it would be important, would it not, to have an understanding with your client or customer, as to what paragraph, what particular paragraphs of the specifications should apply or should not apply?

A. My answer to that is that the easiest way to do it, and the way we did do in this case, was to indicate which part of the specification was applicable, which in this case was the chemical constituents, the size, and the surface condition showing any defects. It is easier to do it that way than to say "eliminating paragraph so-and-so and so-and-so." That becomes quite confusing.

Q. Well, is it possible at all to use the ASTM A-17/29 in inspecting castings? A. Yes.

Q. It is? A. Yes.

Q. And I think you testified in respect to the visual inspection as to size and chemical composition only? A. That is right.

Q. So that if you do that, aren't you eliminating the most important phase and particulars of the specification, that it be a semi-finished rolled [963] or forged material?

A. That was in accordance with our customer's wishes.

Q. Yes, but aren't you eliminating that important phase? A. It is eliminating it, yes.

Q. And also you are eliminating the phase of the provision that it shall be—that sufficient discard shall be made from the ingot to secure freedom from injurious piping and segregation?

(Testimony of Parker M. Robinson.)

A. Don't forget we are not eliminating it. It was eliminated by our customer.

Q. But you still have to have an understanding with your client with respect to these important phases? A. We did.

Q. Is that true about paragraph 6, which requires the billets to be made from ingots of at least three times the cross-sectional area?

A. Not specifically, because it doesn't apply to a cast steel billet.

Q. Well, now, when you received this order from Mr. Clark, I assume it was of sufficient importance when he told you that this was an inspection for castings that you—that it registered in your mind; is that correct? [964] A. Yes.

Q. And when he told you that, you undoubtedly noted the difference between what was required under the ASTM A-17/29 and what would be required to inspect cast steel billets?

A. That is right.

Q. And so you necessarily made a qualification in your inspection when you forwarded your work order to Seattle?

A. We quoted them "cast steel billets" in that work order, yes.

Q. I see. Well, now, referring you to that work order, which I understand was prepared under your supervision——? A. Yes.

Q. The words "to inspect" refer to inspection of "800 steel billets" at Seattle Foundry?

A. Yes.

(Testimony of Parker M. Robinson.)

Q. That doesn't say "cast steel billets," does it, Mr. Robinson?

A. Steel is a generic term. They were steel billets.

Q. Yes.

A. Just the same as if you were asked to inspect 100 pies. It doesn't make any difference [965] whether they are apple or cherry.

Steel is a generic term, and they were steel billets.

Q. But the difference between castings and steel billets is as much difference as dough and bread?

A. Correct.

Q. Isn't one a finished and the other a raw product?

A. Neither are finished products; both are semi-finished, and that assumes they will be further worked by forging, machining, rolling, or some such thing as that.

Q. Now, under the title, "Specifications," you have ASTM A-17/29, Mr. Robinson, and it doesn't appear that there is any qualification in your order, does it?

A. This is an internal order to set up who the customer is, how it is to be reported, and to whom it is to be reported, and copies go to our Pittsburgh office so that they will know how to bill it.

But it does not purport to give much information—the complete information is given to the inspector, if we are going to inspect it in our own office, or is given to the other district office, wherever they are

(Testimony of Parker M. Robinson.)

going to do the inspection. It isn't always given in [966] here; it is very seldom given in here.

Q. Did you read this order before it went out?

A. Yes, I did.

Q. Did you know——

A. (Interposing): Yes, I did.

Q. (Continuing): Did you know that the only reference to cast steel is in reference to the estimated quantity, 800 billets, 200 tons, cast steel?

A. That is right; that is right. That is what they were.

Q. Now, I will ask you the same question that Mr. Savage asked you:

Where in that order is there any qualification of these important paragraphs of ASTM A-17/29?

A. It doesn't purport to be in here.

Q. Then you agree it isn't in here?

A. It is in here implied, in that it is castings rather than forgings or rolled billets. It is certainly implied there.

Q. So that you left it to your inspector in Seattle to interpret this order, is that correct?

A. No, no; we didn't leave anything to the imagination of our inspector in Seattle.

Q. I see.

A. We instructed him by telephone and we [967] instructed him by letter exactly what to do.

Q. Now, Mr. Robinson, your testimony was that you received Mr. Clark's notes, and from that you made up your interoffice inspection order, which is A-7, which you have just seen; is that correct?

(Testimony of Parker M. Robinson.)

A. That is right.

Q. Now, do you have——

A. (Interposing): Let me qualify that to this extent: That I was interested in—the details that I was interested in was to see that we had the proper customer's name, that we had the proper reporting distribution, and invoices.

Now, the details of what was to be inspected, and so forth, came directly from Mr. Clark to our clerical department. My notes give all of that, and did not purport to.

Q. Well, as a matter of fact, you, I think, said you had no personal knowledge?

A. No, I hadn't.

Q. It is all hearsay?

A. That is right; that is right.

Q. Now, you did receive a letter from Mr. Gips, didn't you, dated May 20, 1952, Plaintiff's Exhibit Number 21? Do you have that before you?

A. No, but I know what it is. I did receive [968] it, yes.

Q. Preliminarily, Mr. Robinson, you spoke about the method in which your invoices were billed, and in that there is a reference to a letter, this letter of May 20, 1952.

Do you, in the conduct of your business, send the orders to your Pittsburgh office, or a copy of it?

A. Yes.

Q. And did you send this order here—Plaintiff's Exhibit 21—a copy of it to the Pittsburgh office?

(Testimony of Parker M. Robinson.)

A. I think we did, but I would have to look at the—it is the usual practice to do so.

Q. You probably did?

A. I think we probably did, yes. The reason for sending either a purchase order or a letter of authorization to our Pittsburgh accounting office is that they like to have that to have something to tie their invoice to, so that when those invoices go to the customer, those invoices can be processed much quicker than if they have to go through the organization and find the man who ordered it, and there might be considerable delay. That is the purpose of that.

Q. So then, as I understand your explanation, you treated Plaintiff's Exhibit 21—that is the letter of May 20, 1952——? [969]      A. Yes.

Q. —as the formal order which you had received from Grace, and sent it to your Pittsburgh office, and the reference there is to this particular order?

A. That is right; but we wouldn't consider that as a formal order because my reply of it, the next day, acknowledging receipt of that, very definitely states "in accordance with your verbal instructions."

Q. Well, I think the letter speaks for itself.

A. It speaks for itself, yes. Certainly everything was in that letter of authorization, all the details of the correspondence, the conversations, with Mr. Clark.

Q. That letter you have before you, however,



(Testimony of Parker M. Robinson.)

contained your instructions, did it not, from the Grace and Company?

The Court: You are referring to what letter now?

Mr. Morrow: Plaintiff's Exhibit 21.

The Court: I just want the record to be clear.

Q. (By Mr. Morrow continuing): Will you answer that?

A. Was your question that it contained all of the instructions?

Q. No, it contained instructions?

A. It contained instructions, yes. [970]

Q. Now, your answer, Plaintiff's Exhibit 22, dated May 21, 1952, I believe you said that acknowledged receipt of Grace's letter of May 20?

A. That is right.

Q. And at the bottom here, "Thanking you for this assignment, we remain very truly yours, Pittsburgh Testing Laboratory, Parker M. Robinson,"—thanking you for this assignment, that referred to Mr. Gips' letter of May 20, did it not?

A. It also referred to this verbal agreement here.

Q. Yes, I understand that.

A. The assignment covers the job.

Q. The assignment covers the job?

A. The assignment covers the job—whatever that was.

Q. Now, when you acknowledged that letter, as I understand it you had talked to Mr. Clark and you had referred to his notes.

(Testimony of Parker M. Robinson.)

Let me ask you, first of all, had you talked to Mr. Gips?      A. Not at that time.

Q. Didn't it strike you as being unusual that he would refer to you in his letter as having discussed the matter with you? [971]

A. Not necessarily. My name is so well known on reports and various other things as the District Manager that they very often refer things to me which have not come personally to my attention.

Q. Well, didn't it occur to you that Mr. Gips had not included there the qualification that the inspection was to be of cast steel billets?

A. It did, because he says it is to be done at the Seattle Foundry.

Q. That was your——

A. (Interposing): That was sufficient for me.

Q. That was sufficient for you?

A. To confirm the fact they would be cast steel, because that is all that could be furnished there.

Q. As I understand, then, the fact that Mr. Gips had indicated that the material was going to be manufactured at the Foundry, that was sufficient for you to assume that the product was cast steel billets?

A. Particularly after all the conversation on the telephone that Mr. Clark had with Mr. Gips.

Q. I assume if you made any notes about your important qualification that the material was to be cast steel billets that you would have included those in your notes, Mr. Robinson, is that correct?

(Testimony of Parker M. Robinson.)

A. Not necessarily. Steel billets is a [972] generic term and covers all kinds.

Q. Did you make any notes of your conversation with Mr. Clark?

A. He handed me his notes, and from those I made some notes of my own which were partly the basis of our internal work order.

Q. Referring you to Plaintiff's Exhibit 67, are those the notes you made from Mr. Clark's notes?

A. That is correct.

Q. Are you sure you made those notes from Mr. Clark's notes; are you?      A. Yes.

Q. Isn't it true, Mr. Robinson, that you transcribed those notes from Mr. Clark's conversation with Mr. Gips?

A. That is what he told me that it was conversation with Mr. Gips that led him to write his notes, and he turned them over to me.

Q. Why didn't you include in your notes the important qualification that this material was to be cast steel billets, instead of steel billets, as per ASTM A-17?

A. Here it is here. Grace's order to the Foundry.

Q. I see.

A. In other words, that was a foregone conclusion [973] at that time.

Q. I see.

A. By this, and then we had already forwarded the information to Seattle—our Seattle office—by telephone.

Q. Well, now, did you use Mr. Clark's notes or

(Testimony of Parker M. Robinson.)

your own notes when you wrote up the formal order for your Seattle office?

A. Mrs. King, who is in charge of our clerical work, wrote up that order, and she got it partly from here and partly from Mr. Clark, and as far as the number of reports and where they should go, I think that maybe she may have telephoned herself to find that out, because I don't remember getting it, and I don't know if Mr. Clark got it from Mr. Gips. Somebody must have found out how many reports they wanted.

Q. Well, do you recall in your deposition, given in San Francisco, on Thursday, August 12, 1954—I refer to page 51——

A. (Interposing): I can't recall it right now. Page 51.

Q. Not 51, particularly; but didn't you say that your notes were transcribed from Mr. Clark's conversations with Mr. Gips?

A. That is right. [974]

Q. Well, now, why didn't you include the qualification that the material was to be cast steel billets which were to be inspected, instead of steel billets according to ASTM A-17?

A. Both my notes and Mr. Clark's notes both went to Mrs. King to make up the order, and she undoubtedly talked to him as to details after I turned it over to her.

Q. I see.

A. In other words, although this was written

(Testimony of Parker M. Robinson.)

under my supervision it doesn't mean I went into all that detail.

Q. In your discussion with Mr. Clark, I assume that he told you that Foundry could only make castings of cast steel billets? A. That is right.

Q. And he told you that it had to be assumed that the order of Grace and Company was to inspect cast steel billets?

A. No, he told me—he told me he had so advised Mr. Gips of Grace and Company.

Q. Well, as a matter of fact, you have indicated in your testimony, Mr. Robinson, that because it was to be made at the Foundry that you assumed—that conveyed to you the information that the inspection was to be of cast steel billets? [975]

A. That corroborated it.

Q. I see. That corroborated it?

A. That corroborated it.

Q. Now, do you recall, Mr. Robinson, what time of the day your conversation was with Mr. Clark?

A. No, I do not.

Q. In other words, it could have been——

A. (Interposing): That is three and one-half years ago. I have no idea.

Q. It could have been the first thing in the morning?

A. I don't know; I haven't any idea.

Q. I notice your notes are dated May 16. I notice——

A. (Interposing): I know that it was early

(Testimony of Parker M. Robinson.)

enough so that we were able to telephone Seattle that very day.

Q. On the 16th? A. On the 16th.

Q. And you said Mr. Clark did that?

A. He did that.

Q. And Mr. Clark—now, what would be early enough to telephone Seattle?

A. Well, we are in the same time zone. I wouldn't probably attempt to phone them after the middle of the afternoon. [976]

Q. Did you call——

A. (Interposing): I didn't call, no.

Q. (Continuing): ——in the middle of the afternoon?

A. I would guess that would be a reasonable assumption.

Q. Would it be a reasonable assumption, then, that the information you received from Mr. Clark was in the morning?

A. I haven't any idea. I don't know. I can't make any——

Q. (Interposing): Were you present when Mr. Clark received the call?

A. I was in my own office.

Q. Could you have received the call and referred it to Mr. Clark?

A. No, that isn't our procedure.

Q. You don't know when Mr. Clark received this call from Seattle, do you? A. No.

The Court: From Seattle?

Mr. Morrow: Pardon me. From Mr. Gips?

(Testimony of Parker M. Robinson.)

The Witness: No.

Mr. Morrow: I misspoke myself.

The Witness: Let me clarify that just a little bit, if you will—the routine in our office as [977] to phone calls.

Q. (By Mr. Morrow): All right.

A. As I mentioned a moment ago, my name seems to be very well known, due to the fact that because it is on every report, and many people come in our office and ask for me. When I know I am not handling all the details, I have to refer them to Mr. Clark so that we have made it a rule that when anybody asks for me on the telephone they are immediately switched on to Mr. Clark first, and he is, therefore, able to take care of probably 95 per cent of the telephone calls, and if it needs my personal attention, then Mr. Clark will transfer the call to me.

That is just a general idea of the routine that we use for telephone calls.

Q. Yes. Well, then, Mr. Gips could have talked to you in the preliminary stages in which this order was placed?

A. I think in my deposition I said it may be possible, but I doubt it.

Q. Well, did you say “it could have been”? I don’t remember.

A. I will have to see the deposition to remember.

Q. Yes. [978]

(Whereupon, a document was handed to the witness by counsel.)

(Testimony of Parker M. Robinson.)

A. The question here:

“Now, do you recall that you did have a telephone conversation or conversations in Mr. Gips’ office as a preliminary matter to your obtaining the order?”

“It could have been, but I don’t remember. I doubt very much that I did because the information all came through Mr. Clark.”

Q. Was your recollection—is your recollection of talking to Mr. Gips as a preliminary matter to placing this order any better now than it was at the time you gave your deposition?

A. In thinking it over I cannot see the possibility that I talked to Mr. Gips until I went over to his office a week or 10 days later.

Q. Well, now, you have read the question, and I will ask you if there is any correction that you would like to make in your previous testimony.

The question was:

“Now, do you recall that you did have a telephone conversation or a conversation in Mr. Gips’ office as a preliminary matter to your obtaining the [979] order?”

“A. It could have been. I don’t remember.”

Mr. Gantt: Your Honor, what is counsel trying to do here? Correct the deposition, or correct the testimony today?

I think the question is highly improper.

Mr. Morrow: The witness has testified on direct examination that he didn’t meet Mr. Gips or go to his office until 10 days or two weeks later, and here



(Testimony of Parker M. Robinson.)

it appears he made a contradictory statement in the deposition. It is only fair to the witness I give him an opportunity to correct his previous statement if he desires to do so.

The Court: As I understand, he does not deny he made the answer as set forth in the deposition. Is that correct?

The Witness: No, I made that answer.

Q. (By Mr. Morrow, continuing): Is that your answer now?

Mr. Gantt: He has gone as far as he can go on impeachment at this time now, your Honor.

Q. (By Mr. Morrow, continuing): Is that your answer now?

A. My answer now is that I don't remember ever seeing Mr. Gips until I went to his office a week or 10 days after the order had been placed with us. [980]

However, I will still say that there may be a possibility that he may have called me previous to the time that he called Mr. Clark, and said, "Do you have an office in Seattle that could inspect steel products?" and I told him "Yes," and that is all there was to it. That is a possibility, and that is what I meant in that deposition, but no quotation was given him, no details were discussed. The first actual detail work was done by Mr. Clark with Mr. Gips over the telephone.

Q. Well, is it your testimony now that you did not have any conversation with Mr. Gips regarding

(Testimony of Parker M. Robinson.)

this order until approximately 10 days or two weeks after the date of entry of the order?

A. Except for tying in with what I said in the deposition; I will still stay with that. I might have talked with him, and he might have asked me if we had an office in Seattle, and could we do the work.

That would be as far as that would go.

Q. Then you did have a conversation?

A. I don't know.

Q. Well, didn't you——

A. (Interposing): I don't remember it.

Q. I will read you the questions and answers from your deposition on page 21, line 16—line 15: [981]

“Q. Is it possible, then, that in a conversation with Mr. Gips you told him that you could inspect and certify steel billets to conform to the ASTM specification A-17/29?

“A. That A-17/29, or 49-29—was not mentioned at any time until it was given to Mr. Clark on the phone by Mr. Gips.

“Q. I see. Well——

“A. It wasn't mentioned. If I did that—and it is quite possible I did have sales contact with Mr. Gips prior to this——

“Q. Yes.

“A. (Continuing): ——he would merely ask whether we could make inspection of steel billets in Seattle, and I would tell him we had an office in Seattle, and we can make inspection there. I am sure that there was no mention of a specification,

(Testimony of Parker M. Robinson.)

because if there had been, we would have had to look it up at the time that Mr. Gips called Mr. Clark, and being an obsolete specification, it takes time to look it up."

Were those the questions put to you, and your answers?      A. Yes.

Q. At that time?      A. Yes. [982]

\* \* \*

Q. (By Mr. Morrow): And on page 24 of your deposition, line 10, were these questions put to you, and were these your answers?

I will start with six, in order to be fair.

"Q. In other words, there was no conversation between you and Mr. Gips concerning what the service of Pittsburgh Testing Laboratory should be?      A. That was with Mr. Clark.

"Q. That was with Mr. Clark?

"A. With Mr. Clark.

"Q. Other than perhaps you may have entered into a preliminary conversation with Mr. Gips at the outset?

"A. At the very start, Mr. Gips may have asked me, 'Can we do this job in Seattle?' and I would have told him, 'Yes, we have an office in Seattle and we can do the work for you people.' [983]

"I don't remember it, but it is quite possible that that might have taken place."

Mr. Gantt: If the Court please, I think counsel——

Q. (By Mr. Morrow, continuing): Were those questions put to you and were those your answers?

(Testimony of Parker M. Robinson.)

The Court: I don't see the purpose.

Mr. Morrow: He testified he didn't have any conversation with Mr. Gips.

The Court: He likewise testified, where you asked him, Mr. Morrow, about the possibility of a conversation, and now we are just reading in a deposition. He has already indicated, I think, in substance, what you are repeating there, Mr. Morrow.

Mr. Morrow: Yes.

Q. (By Mr. Morrow, continuing): Now——

The Court (Interposing): Unless there is something else?

Mr. Morrow: I believe it is repetitious, your Honor, and I will not press the question.

Mr. Gantt: I ask it be stricken, your Honor.

Mr. Morrow: I am agreeable.

The Court: What do you want stricken? [984]

Mr. Gantt: This entire last question stricken, where he started reading from the deposition.

The Court: That is when he started the last reading?

Mr. Gantt: Yes, your Honor. In fact, I want to get more than that stricken, just because I think it is repetition. He read the deposition three times.

Q. (By Mr. Morrow, continuing): Mr. Robinson, you admit that it is possible you had a conversation or conversations with Mr. Gips prior to your letter to him of May 21st——

Mr. Gantt: Objection, your Honor.

Q. (By Mr. Morrow, continuing): 1952?

(Testimony of Parker M. Robinson.)

The Court: The question is, does he admit?

Mr. Morrow: Yes.

Mr. Gantt: Objection, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Morrow, continuing): Did you have a conversation with Mr. Gips prior to May 21, 1952?

Mr. Gant: Objection, your Honor. He has already answered that.

The Court: I think you have covered that, Mr. Morrow. [985]

Mr. Morrow: All right.

Q. (By Mr Morrow, continuing): Now, in respect to these telephone conversations with Mr. Clark, those occurred, did they not, prior to your letter of May 21, 1952? A. Yes.

Q. And, as far as you know, Mr. Clark had no conversations concerning inspection and certification of these steel billets subsequent to Plaintiff's Exhibits 21 and 22—that is, the letters of May 20th and 21st—but the conversations were in reference to a time prior to that?

Mr. Gantt: Your Honor, can that question be read again, please?

The Court: It seems to be rather long. I will ask counsel to restate it.

Mr. Morrow: Yes; it is a double question.

Q. (By Mr. Morrow, continuing): So far as you know, Mr. Clark had no conversation with Mr. Gips concerning inspection and certification of steel billets subsequent to May 21, 1952?

(Testimony of Parker M. Robinson.)

A. Well, I think there were questions came up as to the depth of chipping and the taper allowed on the pattern, and things like that. [986]

I believe he did talk to Mr. Gips after that on details.

Q. But nothing with reference to the terms of the agreement between yourself and Grace?

A. What do you mean by "the terms"?

Q. Well, you had a contract, an agreement to inspect, according to you, cast steel billets, is that right?

A. That is right.

Q. These conversations in reference to the terms of that contract—there was nothing discussed so far as you know after May 21st, was there?

A. The very fact that he discussed taper on a pattern would indicate he was talking about casting.

The Court: The question was anything discussed as to the terms?

The Witness: Well, he was saying—I don't understand what terms are there.

Q. (By Mr. Morrow): You don't understand what terms are?

A. Terms might mean terms of payment, or something like that.

Q. I see; you don't understand what terms are?

A. I don't understand what you mean.

Q. Well, put it this way: [987]

It is your understanding, isn't it, that the conversations or any conversations Mr. Clark had with Mr. Gips subsequent to May 21, 1952, had to do

(Testimony of Parker M. Robinson.)

solely with the details of carrying out the inspection?      A. As far as I know.

Q. Yes. Will you refer to Plaintiff's Exhibit 22? Do you have that before you? Your letter of May 21st.      A. This is it—22, yes.

Q. You dictated this letter?      A. Yes.

Q. Which was an acceptance of Mr. Gips' order?

A. That's right.

Q. Now, in there you have reference to Silicon, is that right?      A. That is right.

Q. Now, I believe on your direct examination you stated that you had consulted with the ASTM A-17/29 specifications prior to writing this letter?

A. That is right.

Q. And did you obtain your chemical composition from the specifications?

A. I think I will explain that the same as I did in my deposition, that the usual chemicals—elements—wanted in a steel specification are carbon, manganese, sulphur, phosphorous and silicon; and we have [988] a standard \$10.00 charge for that, and the fact that silicon wasn't necessary in this particular specification didn't alter the price.

I think I said in my deposition that if they got the silicon, which we may or may not have done, I don't think it was done because it was sub-contracted to another laboratory, that would be lagniph. That is a New Orleans term for the thirteenth doughnut in a baker's dozen. I think I put that right in the deposition there.

Q. Yes. Now, does the chemical composition pro-

(Testimony of Parker M. Robinson.)

vision of ASTM A-17/29 specify silicon as a part of the chemistry?      A. No.

Q. Then you didn't read the ASTM A-17/29 with reference to the chemical composition, did you?

A. I read it, but I could easily make that slip because silicon is so frequently used as one of the elements to test for in a steel analysis. It is very common.

Q. By the way, where did you get your ASTM A-17/29 specifications?

A. Out of our own library.

Q. And where is your library located?

A. The second floor of the building. [989]

Q. It was necessary to go there to get them?

A. Yes. We have the current sets on the first floor where they are available. The older editions we put in our library because it is rather infrequent that we have to refer to them.

Q. You don't profess to have any technical knowledge on the manufacture of foundry products, do you, Mr. Robinson?      A. No.

The Court: Manufacture of foundry products?

Mr. Morrow: Manufacture of foundry products.

Q. (By Mr. Morrow): You wouldn't know whether it was proper or not, for example, to pour a casting flat where you intended to produce a forged product or a semi-finished product?

A. Yes, I could answer that because in my engineering work I have had occasion to use castings



(Testimony of Parker M. Robinson.)

a great deal, and I know that a great many good castings are made by casting them flat.

One particular instance, I have done a good deal of marine engineering work in shipyards in stem frame casting of a ship, which is a very important member of the ship's frame; it forms the opening in which the propeller rotates; and the after part of that [990] is the stern post which supports the rudder.

Those are big castings, and they are all cast flat. That is just one instance.

Q. I see. But you still don't profess to have any technical knowledge in respect to the product——

Mr. Gantt: Objection, your Honor. He just answered the very same question.

The Court: Objection overruled.

A. As to the detail foundry practice, I would not pretend to be an expert, but I do know foundry practice in general and what good castings can be made in different positions. I will answer that a little farther——

Q. (By Mr. Morrow, interposing): Well, you have answered it sufficiently for me.

A. All right.

Q. When you sent your formal order to Seattle on May 21, 1952, were you acquainted with Mr. Johnson?      A. Yes.

Q. How long had you been acquainted with him?

A. Wait a minute. I will have to amend that. I don't think I met Mr. Johnson until a later date than that.

(Testimony of Parker M. Robinson.)

I made a trip up here to Richland, [991] Washington, where they have the Atomic Energy Commission, and I think it was in the fall of 1954, and I think that was the first time I met Mr. Johnson.

I did not know him personally at the time of this transaction.

Q. Did you know his qualifications or the qualifications of any of his inspectors? A. No.

Q. To inspect steel billets? A. No.

Q. Is that why you advised him in your letter of May 21st, Plaintiff's Exhibit No. 5, that "since these billets are being shipped to a far-away country it is of vital importance that your inspection of them be thorough and accurate"?

A. That is right. I did not know Mr. Johnson at that time, or any of his inspectors, so that I put that in as a precaution.

Q. And did you also ask him to consult with you if he didn't have a competent inspector for this type of work? A. No, I didn't ask him that.

Q. Well, here is your exact words:

"If you do not have a competent inspector for this type of work, call in someone you know [992] to consult with you."

Mr. Gantt: Objection, your Honor. The exhibit speaks for itself.

The Court: Objection to what?

Mr. Gantt: To——

The Court: He is just reading the letter.

Mr. Gantt: I beg your pardon.

Q. (By Mr. Morrow, continuing): You made

(Testimony of Parker M. Robinson.)

that statement, did you, Mr. Robinson, because you were unfamiliar with the qualifications of the personnel in your Seattle office?

Mr. Gantt: Objection, your Honor; the exhibit speaks for itself.

The Court: The question is the purpose of the reference there. You may answer.

A. Yes, I did not know. I think I have already answered that. I did not know Mr. Johnson or his inspector, so I put it in as a precaution that they would follow what suggestions I made.

Now, to answer the other question that you started to ask——

Mr. Morrow: You needn't answer any further questions, sir, and thank you very much for your assistance.

The Court: Is that all? [993]

Mr. Morrow: Yes. [994]

\* \* \*

## WILLIAM WALLACE CLARK

upon being called as a witness for and on behalf of the defendant, and, upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: William Wallace Clark.

The Clerk: Clark, C-l-a-r-k (spelling)?

The Witness: Right.

## Direct Examination

By Mr. Gantt:

Q. State your name, sir.

A. William Wallace Clark.

Q. And your address?

A. 951 Eddy South, San Francisco, California.

Q. What is your present occupation?

A. Employee of the Pittsburgh Testing Laboratory in San Francisco.

Q. How long have you held that job?

A. Since the spring of 1948.

Q. Spring of 1948? A. Correct.

Q. And what is your particular job at the [999] present time?

A. Manager of the Laboratory.

Q. What was your job in 1952?

A. Manager of the Laboratory.

Q. And in what office?

A. In the San Francisco office.

Q. And do you have any engineering training in college? A. Yes, sir.

(Testimony of William Wallace Clark.)

Q. Will you state what that was?

A. I will have to go back a bit.

First, I took a B.S. degree in Chemistry and Metallurgy in Westminster College in Pennsylvania, and a Bachelor's—a Master's degree at Pennsylvania State in Pennsylvania, and a Doctor's degree at Johns Hopkins University.

Q. What was your doctorate in?

A. Chemistry and Metallurgy.

Q. When did you obtain your doctorate?

A. I finally obtained it around 1909.

Q. What business experience have you had prior to 1948, when you came to work with Pittsburgh Testing Laboratory?

A. I had been six years as Chief Metallurgist for the Enterprise Engine and Foundry Company in San [1000] Francisco.

Q. What did you do prior to that?

A. Prior to that I spent a number of years as Consulting Engineer for myself and also some years export and import business.

Q. What was the nature of the work that you performed at the Enterprise Engine and Foundry Company in San Francisco?

A. I had charge of all operations, making steel castings, iron castings, brass and bronze castings, and aluminum castings.

Q. So that your casting was both ferrous and non-ferrous materials?

A. Yes, sir.

Q. What did you do prior to being in the con-

(Testimony of William Wallace Clark.)

sulting engineering and export and import business?

A. I had been two years as manager of the—works manager of the Noble Electric Steel Company.

Q. Could you talk just a little bit louder, Mr. Clark? It is rather difficult to hear back here at the table.

What did you do prior to that?

A. I had spent two years in Connecticut as Metallurgist for Seymour Manufacturing Company, manufacturing German silver, brass and [1001] bronze.

Q. And what occupation did you have prior to that, or what job?

A. I had been for six years Chief Metallurgist for American Vanadium Company.

Q. What was the nature of that work?

A. Making ferro-vanadium, promoting its use in steel.

Q. What work or employment did you have prior to American Vanadium Company?

The Court: What company is that?

Mr. Morrow: American Vanadium.

Q. (By Mr. Morrow, continuing): What work did you have prior to that, Mr. Clark?

A. I had been Metallurgist for the Colonial Steel Company in Monaca, Pennsylvania.

Q. What was the nature of that particular work?

(Testimony of William Wallace Clark.)

A. That particular plant was a steel manufacturer, both open hearth and crucible.

Q. How many years were you there?

A. Two years.

Q. Was that a rolling mill?

A. A rolling mill and a hammer shop.

Q. By that you mean a forging—

A. A forging mill, yes, sir. [1002]

Q. You mean forging. What work did you do prior to working for Columbia Steel? Or, Colonial Steel?

A. Prior to that I had spent my vacations working in the steel mills in Western Pennsylvania.

Q. Were those rolling mills or forging shops or foundries? A. Mostly rolling mills.

Q. You say your vacations; was that when you were going to college? A. Yes.

Q. And post-graduate work? A. Yes.

Q. Most of your business experience, then, has been in the field of metallurgy and chemical engineering? A. Yes, sir.

Q. Are you familiar with the order for inspection or the request for inspection of steel billets by Grace and Company that has been discussed in this case? A. I am.

Q. Will you tell us what was your first connection with Grace and Company in this case?

A. My first connection with Grace and Company was a telephone call from Mr. Gips of W. R. Grace and Company.

(Testimony of William Wallace Clark.)

Q. And will you tell us, if you can fix the [1003] date of that telephone conversation?

A. May 16, 1952.

Q. And do you know what day of the week May 16th was? A. Friday.

Q. Were you at your office when you received this telephone conversation—this telephone call?

A. Yes, sir.

Q. At Pittsburgh Testing in San Francisco?

A. Yes, sir.

Q. Who is the manager—who was the manager in 1952 of your San Francisco office?

A. Mr. Robinson was the District Manager at that time.

Q. Was he your superior?

A. He is my superior—was and is my superior.

Q. What is the proximity of your office to Mr. Robinson's? A. Adjoining.

Q. Now, you testified that your first connection was with the telephone conversation with Mr. Gips of W. R. Grace and Company on May 16, 1952.

Will you tell us what took place in that telephone conversation—what was said and done—what was said by both parties? [1004]

A. Mr. Gips inquired if we had an office in Seattle. I told him that we had. He asked if we could inspect cast steel billets at that office, and I told him that we could. He told me that he had an order for 800 cast steel billets to be made at the Seattle Foundry under the specification A-17/29.

I asked him to hold the 'phone while I got the specification. I looked in my current bookcase for



(Testimony of William Wallace Clark.)

the current file at that time, which was 1949. It made no mention of A-17/29.

I returned to the 'phone and told Mr. Gips it was an obsolete specification, that I would have to go upstairs to our library and find the specification, and I would call him back.

Q. What did you do next?

Mr. Morrow: Now, just a minute. I move that that part of the answer which refers to the request to inspect cast steel billets be stricken as tending to contradict the terms of the written contract between Grace and Pittsburgh.

The Court: Well, the Court's ruling will be as I have indicated before. I think the testimony is admissible if for no other purpose than to establish the circumstances under which the contract, whatever it may have been, was made. [1005]

It may have a bearing on any interpretation of the contract if it is found to be covered by the letters, and therefore the Court overrules the objection, but does not admit it solely for the purpose of varying the terms of any integrated agreement.

Mr. Gantt: Very well, your Honor.

Q. (By Mr. Gantt, continuing): What did you do next, Mr. Clark?

A. I read the specification A-17/29, and then called Mr. Gips on the telephone.

When I got in contact with him I told him that I had the specification in front of me and that the specification calls for rolled or forged billets, but that his order, as he had quoted it to me, was for

(Testimony of William Wallace Clark.)

cast steel billets, and that this specification would not apply except in certain portions?

Mr. Savage: Except in what certain portions?

Mr. Morrow: Have you finished, Mr. Clark?

Mr. Gantt: I don't think that he has finished.

Mr. Morrow: I think he finished.

A. (Continuing): Well, period.

Mr. Morrow: I make the same motion.

The Court: The same objection may show and the Court's ruling will be the same. [1006]

Q. (By Mr. Gantt): Was anything else said in that telephone conversation?

A. Mr. Gips told me he had this order for cast steel billets, and it was placed with Seattle Foundry, and I told him in that case we could inspect for cast steel billets; and he also inquired what the price would be, and I told him \$4.00 an hour plus any incidental expense he required, and told him that all we could inspect for would be chemical analysis, surface defects and size.

He also inquired the cost of the chemical analysis, which I gave him. It was \$10.00, a package deal.

Q. What do you mean— "\$10.00, a package deal"?

A. Well, in the steel business the ordinary, plain carbon steel calls for five elements, and we have a price on that of \$10.00. If they only get four, it is still ten dollars, because it is a package operation.

Q. Where was that analysis to be done?

A. In our laboratory in San Francisco.

Q. Did you tell Mr. Gips that?

A. Yes, sir.

(Testimony of William Wallace Clark.)

Q. Was that satisfactory with him?

A. That was satisfactory to Mr. Gips.

Q. Did you make any notes of that [1007] telephone conversation?

A. I always make notes of any telephone conversation as it proceeds.

Q. Did you make any notes of that telephone conversation, Mr. Clark?

A. I made notes of that telephone conversation.

Q. I will hand you what has been marked Defendant's Exhibit A-1, and ask if you can identify those—that exhibit?

A. That is my writing, yes, sir, made by myself.

Q. When was it made by you?

A. It was made on May 16th.

Q. And at what time?

A. Time of the day?

Q. Yes.           A. I do not remember.

Q. Was it made during or shortly after your call with Mr. Gips?

A. It was made shortly after my second call to Mr. Gips.

Q. What did you next do, Mr. Clark?

A. After making this—these notes, I took them into Mr. Robinson's office, which is next door to mine, and told him about the order, and asked him—as I was very busy, if he would please write up the work order. [1008]

Q. Did you leave your notes, Exhibit A-1, with Mr. Robinson?

(Testimony of William Wallace Clark.)

A. I left them with him for a short time and he brought them back.

Q. What was your next connection with this employment?

A. On that same day Mr. Gips had told me that this particular job was in a rush, that Seattle Foundry was ready to proceed, and I conferred with Mr. Robinson and suggested that I call Mr. Johnson, the Seattle manager, and give him the details of the inspection, and have him contact Seattle Foundry to set up procedure.

Q. What did you do next?

A. That is my total connection with it that day.

Q. Did you call Mr. Johnson?

A. Yes, I called Mr. Johnson and told him the full details of the inspection.

Q. Do you recall whether in that telephone conversation you made reference to your notes?

A. Yes, sir.

Q. Defendant's Exhibit A-1?

A. Yes, sir, I had the notes in front of me.

Q. What was your next connection with the job, the billet inspection job in this case?

A. The next day, which was Saturday, May 17th, [1009] I had our secretary write a letter to Mr. Johnson confirming my telephone conversation.

Q. Did you dictate the letter?

A. Yes, sir.

Q. I will hand you what has been marked Defendant's Exhibit A-3. Is that your signature?

A. That is my signature.

(Testimony of William Wallace Clark.)

Q. Is that the letter you wrote on May 17th?

A. That is the letter I wrote on May 17th.

Q. To the Seattle office of Pittsburgh?

A. To the Seattle office of Pittsburgh Testing Laboratory.

Q. Is it your habit to work on Saturdays, Mr. Clark?

A. I have worked every Saturday for the last five years.

Q. And do you have a secretary down on Saturdays?

A. The secretary on Saturdays is there from 9:00 o'clock until 1:00.

Q. What is her name?                      A. Mrs. King.

Q. What did you next do in connection with the billet inspection job?

A. The next connection I had with the order was a call from Mr. Gips asking about the taper on the [1010] billets.

Q. What was said in that conversation, to your best recollection?

A. To my best recollection he had a letter from Seattle inquiring about the taper on the billets, and I told him that when you were making cast billets in sand that there had to be a taper on the pattern, or it would not pull clean.

In other words, if it was perfectly square, it would ruin the sand mold.

Mr. Morrow: Pardon me. Was the time of that conversation established?

(Testimony of William Wallace Clark.)

Q. (By Mr. Gantt): Will you tell us approximately when that conversation took place?

A. I would—offhand, I would say it was a week or ten days later, maybe more.

Q. Following—a week or ten days later than what?      A. Than May 17th.

Q. What was your next connection with the billet order, Mr. Clark?

A. The next connection I had with this billet order was that Seattle did not understand the chipping and cleaning of the billets for further forging or [1011] rolling.

The Court: When you speak of Seattle, you are speaking of your office?

The Witness: I beg your pardon?

The Court: You said Seattle didn't understand.

The Witness: That Mr. Gips called me and said that their Seattle office did not understand.

Q. (By Mr. Gantt): What was said—anything else said in that conversation by you with Mr. Gips?

A. I went back to the library and got the specification A-17/29, and read to him the limits to which chipping could be done.

Q. I will hand you what is Exhibit A-33, Defendant's Exhibit A-33, Part I, Metals, ASTM Standards of 1939 of the American Society of Testing Materials.

I will ask if you can identify that volume?

A. That is a volume of ASTM, 1939.

Q. From your library?

(Testimony of William Wallace Clark.)

A. I think it does—it doesn't have our time in it, but it is very much like the one that we had.

Q. Is this the volume you consulted?

A. That is the volume I consulted.

Q. On the chipping question?

A. On the chipping question.

Q. Is this the volume that you consulted when you [1012] first—in your second conversation with Mr. Gips?

A. That is the one that contained A-17/29.

Q. What was your next connection with this job, Mr. Clark?

A. Why, I wrote a letter to our Seattle office explaining in detail the chipping process.

Q. Handing you what has been marked Plaintiff's Exhibit No. 4—wait a minute—Defendant's Exhibit A-9—I ask if you can identify that?

A. That is my signature, and that is the letter that I sent to our Seattle office.

Q. To whose attention in Seattle?

A. Attention of M. E. Johnson, Seattle Manager.

Q. And what is the date of that letter?

A. June 4th.

Q. What was your next connection with this job?

A. The next connection with this job was Mr. Gips called me in regard to a manganese determination that was three points higher than the specified maximum given in the specifications.

(Testimony of William Wallace Clark.)

Q. What was the substance of that telephone conversation?

A. He asked me what to do about too much manganese in that particular heat.

Q. What was your reply? [1013]

A. I told him that in my mind the .03 per cent would do no harm, but he should contact his client and see if they wanted to accept.

Q. Now, prior to your telephone conversation of May 16th, 1952, with Mr. Gips, had you had any experience in the foundry business with the production of cast steel billets? A. Yes, sir.

Q. And will you describe what experience you had had in that connection?

A. Some time after the end of World War II, steel was very short, and while at Enterprise Engine and Foundry Company we received an order for cast steel billets, which we produced.

These billets were cast in sand, and as a regular foundry procedure.

Q. Were they poured flat, or vertical?

A. They were poured flat.

Q. This was where?

A. At the Enterprise Engine and Foundry Company.

Q. In San Francisco?

A. In San Francisco.

Q. Were you in charge of that operation?

A. I was in charge of that operation as [1014] metallurgist.



(Testimony of William Wallace Clark.)

Q. I don't believe I asked you, Mr. Clark, if you were a member of any technical societies?

A. I am.

Q. Will you please state what technical societies you belong to?

A. American Foundrymen's Society, American Welding Society, American Society of Metals, and Society of Non-Destructive Testing.

Q. How long have you belonged to the American Foundrymen's Society?      A. Since 1942.

Q. Do you know of any foundry at the present time that produces cast steel billets?      A. I do.

Q. Where are they located?

A. There is one located in Berkeley, California, Pacific Steel Casting Company, who from time to time casts steel billets for forging.

Q. Did you ever meet Mr. Gips in person?

A. Not until after the claim came in from W. R. Grace and Company.

Q. Was that some time in 1953?

A. I believe it was.

Q. In your telephone conversation with Mr. Gips, which you testified to, did Mr. Gips tell [1015] you where the material was going to be shipped?

A. He told me that the material was to be shipped to New Zealand.

Q. Did Mr. Gips in those telephone conversations to you tell you the intended use of the material in New Zealand?

A. He did not mention the end use in any manner.

(Testimony of William Wallace Clark.)

Q. He did not tell you that the material was going to be used for locomotive parts and coupler heads? A. He did not.

Q. Did Mr. Gips read to you Plaintiff's Exhibit number 1, which is a letter of April 3, 1952, from Grace, Washington office, to Grace, San Francisco office? A. He did not read that letter to me.

Q. Did he at any time during your telephone conversations prior to the claim in this case show you or read to you the purchase order that Grace had from the New Zealand government?

A. He did not read it to me, or show it to me.

Q. Will you define for us the word "porosity" as it applies to the casting business in the steel business?

A. Porosity as applied to the steel business, casting business or steel business, is voids in the steel. [1016]

Q. How are they formed, or what causes them?

A. They are formed by gas which has become entrapped in the metal and is thrown out when the metal solidifies.

Q. What are blow-holes?

A. A blow-hole is a large porosity caused by a large accumulation of gas which is trapped in the inside of the steel.

Q. Now, is the porosity or the blow-holes which you have described visible in a casting from visual inspection of the finished casting?

A. Blow-holes and porosity are not visible to the eye as when the molten steel comes in contact

(Testimony of William Wallace Clark.)

with the cold sand of the mold, it immediately solidifies, and the center of this casting is molten steel; and as this center solidifies, it throws out the absorbed gas, which makes the porosity and the blow-holes in the center of the casting.

Q. Well, then, would you say that porosity and blow-holes were visible on the outside surfaces of the casting?

A. I would say they were not visible.

Q. You heard Mr. Murphy—or did you hear Mr. Murphy testify in this case?

A. Yes, sir. [1017]

Q. All of it—all of it?                      A. Yes, sir.

Q. You were here in the courtroom?

A. I was in the courtroom.

Q. Did you hear Mr. Murphy describe how he cross-sectioned the castings?

A. I think he testified that he cross-sectioned approximately twelve, about one dozen of the billets that he was casting at his foundry.

Q. Did you hear him describe his cross-sectioning?                      A. Yes, sir.

Q. I believe he testified that he would take a billet and cut it down the center?

A. Yes, sir. [1018]

\* \* \*

Q. (By Mr. Gantt): Assuming, Mr. Clark, that a foundry is producing cast steel billets, an order of cast steel billets of the size  $9\frac{1}{2}$  inches by 4 inches by 4 feet  $1\frac{1}{2}$  inch, 750 of that size, to conform to

(Testimony of William Wallace Clark.)

chemical requirements, visual examination, and size, to ASTM A-17/29; and assume further that in the process of making the billets the foundry in the early stages of the manufacture of the billets takes about one dozen of the billets as they had been cast, and cuts them down the center lengthwise, and then cuts them in four or five places along the width.

Now, would that be good foundry practice?

A. That is good foundry practice.

Q. Assume further that the foundry, after making [1019] such cross-sections, did not discover any blow-holes or pinholes or porosity in any of the sections which had been cross-sectioned.

Will you tell us whether——

Mr. Gantt: Strike that; strike that question.

Q. (By Mr. Gantt, continuing): Now, did you hear Mr. Murphy's testimony as to how he manufactured the cast steel billets which were shipped or delivered or furnished to W. R. Grace and Company?

A. Yes, sir.

Q. In your opinion, did he employ good foundry practice and procedure in his casting operation?

A. His description of his foundry practice seems to me to be good foundry practice.

Q. In what ways can internal defects in steel castings be determined?

A. They can be determined by the destructive test of sectioning, or they can be determined by radiograph, which is non-destructive.

Q. Will you examine Exhibit—Plaintiff's Ex-

(Testimony of William Wallace Clark.)

hibit number 56, the portion relating to ASTM A-17/29; will you examine that a moment, Mr. Clark?

Are you familiar with that specification?

A. I am familiar with that specification, yes, sir. [1020]

Q. Will you tell me, Mr. Clark, whether A-17/29 specification of ASTM requires either radiography or cross-sectioning?

Mr. Morrow: I believe the exhibit speaks for itself.

The Court: You are referring to the specification here involved?

Mr. Gantt: Yes, I am referring to the specifications, your Honor.

The Court: Well, I think it is a matter which is a scientific subject, and I think this man is an expert.

I assume you are calling upon him in that capacity?

Mr. Gantt: Put it this way: By this question I am asking as an expert, your Honor, yes; I think he has been sufficiently qualified.

A. The specification does not call for sectioning, or for radiographs.

Q. (By Mr. Gantt): Did you hear Mr. Tom Williams testify in this courtroom last Friday in this case? A. Yes, sir.

Q. Did you hear him testify as to the approximate cost of radiography of a steel billet of the size [1021] and description mentioned in this case?

(Testimony of William Wallace Clark.)

A. Yes, sir.

Q. I believe he testified that the approximate cost for each billet would be about \$80.00?

A. Yes, sir.

Q. Do you agree with Mr. Williams' estimate of that cost?

A. Well, he was rather moderate in his estimate of the cost.

Q. Are you familiar with radiography?

A. Yes, sir.

Q. Do you have equipment in your San Francisco office to radiograph metal products?

A. We have two X-ray machines and two different sources of isotopes, which are classed generally as gamma rays.

Q. And you—do you from time to time employ these?

A. I have two men that do nothing else but X-ray and Gamma ray.

Q. And under whose supervision are they?

A. Under my supervision.

Q. Are you familiar with the cost that is charged for radiography?

A. I have to quote the price on these, on each order that we receive for radiograph. [1022]

Q. I believe there has been some testimony as to the word "cropping" of a billet, or "discarding."

Will you tell us at what stage in the manufacture of a billet, a steel billet under A-17/29 of ASTM the billet is cropped or discarded?

A. The cropping is done after the billet, ingot

(Testimony of William Wallace Clark.)

or billet, has been reduced to a convenient size to shear off the top end.

Q. Now, are ingots—now, is the ingot cropped, or is that done in the billet stage?

A. The cropping is done in the billet stage.

Q. I will hand you Exhibit 20, which is a letter dated May 16, 1952, from W. R. Grace and Company, Seattle, to the Seattle Foundry Company; and I will ask you to state if you have ever seen that letter or a copy of that letter?

A. I do not remember having seen a copy of that letter at the present time, unless it was in one of your exhibits.

Q. Well, let me ask you this:

Did you see this letter at any time prior to the time of the claim arising in New Zealand?

A. No, sir.

Q. On these billets?                      A. No, sir. [1023]

Mr. Gantt: Just one minute, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Now, Mr. Clark, I hand you what has been marked Defendant's Exhibit 5—rather, Plaintiff's Exhibit 57—which purports to be a photograph of a cross-section after cutting, shearing a portion of the billet away, off a  $9\frac{1}{2}$  inch by 4 inch by 4 and  $\frac{1}{2}$  foot billet, which, perhaps, took place in New Zealand after these billets had been shipped to the New Zealand Government Trade Commissioner.

(Testimony of William Wallace Clark.)

Will you examine that photograph and state what is indicated?

A. That is an indication of an internal blow-hole.

Q. Could that be seen by visual examination?

A. No, sir.

Mr. Morrow: What exhibit was that, please?

Mr. Gantt: 56.

Mr. Morrow: 56?

Mr. Gantt: Your Exhibit 56.

Q. (By Mr. Gantt): I will hand you what has been marked Plaintiff's Exhibit 58, which purports to be photographs of sections of steel billets of the size 6 inches by 3 inches by 10 feet, after they had been cross-sectioned or cut off [1024] 9 to 12 inches from the end of the steel billet.

With regard to the top photograph, which is referred to as cast number 930, are there any defects shown in that photograph?

A. They show very small defects which look like blow-holes just under the skin of the casting.

Q. Would those be visible——

The Court (Interposing): Just under what?

The Witness: Just under the skin of the casting.

Q. (By Mr. Gantt, continuing): Would those be visible upon examination of the casting without cutting it? A. No, sir.

Q. Now, will you examine the photograph of a billet in cast number 1010, which is a photograph of a portion of the billet, and then state what those—what is indicated by that photograph?



(Testimony of William Wallace Clark.)

Mr. Morrow: Pardon me. Is that still Exhibit Number 58?

(Whereupon, Mr. Gantt nodded in the affirmative.)

Q. (By Mr. Gantt, continuing): What is shown by the photograph of cast number 1010?

A. That shows a considerable number of blow-holes inside the casting. [1025]

Q. Now, would those be visible upon visual examination? A. No, they would not be visible.

Q. Now, does the same hold true for the defect in the casting on the bottom of the page?

A. The casting at the bottom of the page shows blow-holes which do not come to the surface of the casting.

Mr. Gantt: One moment, your Honor.

(Whereupon, there was a brief pause.)

Q. (By Mr. Gantt): Would you say that the cross-sectioning of three out of 750 steel billets of the size 9 inches by 4 inches by 4 feet 1½ inch was a fair sampling of the billets?

A. In the percentage, that is not a fair sampling.

Q. Would the fact that some internal defects were disclosed by cross-sectioning three out of 750 billets of the size described indicate that 50 per cent of the remainder of the billets were defective?

A. It would not indicate that.

Mr. Gantt: No further questions, Mr. Clark.

Mr. Savage: Will you please note that Seattle

(Testimony of William Wallace Clark.)

Foundry is cross-examining Mr. Clark here in the cause of Pittsburgh versus Seattle Foundry? [1026]

### Cross-Examination

By Mr. Savage:

Q. Mr. Clark, referring to Exhibit—Defendant's Exhibit A-33, which is the ASTM Standards of 1939, do I understand that this is the actual book that was in your library in San Francisco?

A. As near as I know, that is.

Q. This is the actual book issued in 1939 that you examined when Mr. Gips talked to you on the 'phone and you informed him that you would go to the library and examine the ASTM A-17/29?

A. That, as far as I know, is the actual book.

Q. Mr. Clark, is such a volume, ASTM Standards, 1939, or any equivalent volume, an essential part of the business of a branch office operated in San Francisco?

A. The ASTM Standards are an essential part of our business.

Q. And I assume that a volume such as this 1939, Defendant's Exhibit A-33, or an equivalent, has been in your library for many years?

A. Since possibly 1940, when the 1939 comes out.

Q. Would you say that the variety of work which you perform is predicated—I mean the investigation or inspection of the work called for by your branch would in a large percentage be based upon these standards? [1027]

(Testimony of William Wallace Clark.)

A. They are based upon ASTM, M.I.L., Federal Air Force, and other specifications. ASTM is only a part of the specifications which we have to refer to.

Q. Yes. I understand that. But would you say, considering the type of work you do in the San Francisco area, and the variety of work that you do, would a large percentage of your work be predicated upon ASTM specifications?

A. A percentage of it would be. I could not give you the exact percentage.

Q. Well, would it be large or small?

A. Well, considering the many other different specifications, I would say that it has its certain value.

Q. Now, then, at the time that you had this conversation with Mr. Gips, which I understand was on May 16th, 1952, did Mr. Gips, when he made inquiry as to your being capable of inspecting cast steel billets in the Seattle area, did he mention the name of the supplier or the producer?

A. He told us it would be made by the Seattle Foundry Company.

Q. And at that time in the course of the conversation you told him, after going upstairs to examine the ASTM specifications, that the cast steel billets could not comply because that meant rolled or forged steel; am I [1028] correct?

A. That according to A-17/29 that called for rolled or forged billets, but that Seattle Foundry could not make rolled or forged billets.

(Testimony of William Wallace Clark.)

Q. Did you tell him that?

A. I told him that.

Q. How did you know that?

A. During the war times it was my business to know what each foundry, which I believe was ten at that time here, could produce, and I am also a member of the American Foundrymen's Society, and we, as a Society, know what each foundry on the Coast is capable of producing.

Q. Well, then, if you had never had a conversation with Mr. Gips at any time in your life prior to May 16th, 1952, you personally knew that Seattle Foundry could only cast steel billets; is that what I understand you to say?

A. I personally knew that from former information.

Q. And you knew that on May 16, 1952?

A. I knew that May 16, 1952.

Q. And you knew that they couldn't roll or forge steel?

A. I knew that.

Q. Now, then, at the time you had this conversation with Mr. Gips, did he give you the substance of any agreement which they had with Seattle Foundry, either oral [1029] or in writing?

A. He gave me no information except that Seattle Foundry were making the cast steel billets.

Q. Did you, before you called Mr. Johnson in Seattle, acquire the information as to the contents of any agreement, oral or written, between Seattle Foundry and Grace?

(Testimony of William Wallace Clark.)

A. That was of no interest to me, so I would make no inquiry.

Q. Now, then, when you called Mr. Johnson of the Seattle office, I assume it was between May 16th and May 17th? A. It was on May 16th.

Q. May 16th. Did you inform Mr. Johnson that Grace wanted cast steel billets to be inspected?

A. I did.

Q. Did you inquire of Mr. Johnson if he had ASTM specifications?

A. I don't remember that I did.

Q. Did you tell Mr. Johnson that if he inspected cast steel billets that it would not include rolled or forged? A. I did.

Q. So that you told Mr. Johnson he was not going to inspect rolled or forged billets? [1030]

A. That is correct.

Q. In substance, you have predicated your testimony on your notes and also on your independent recollection, is that right? A. Yes, sir.

Mr. Savage: That is all.

### Cross-Examination

By Mr. Morrow:

Q. Mr. Clark, you have had a long experience in the steel business, haven't you? A. Yes, sir.

Q. And you spent eight years, did you, with the Enterprise Engine Works in San Francisco?

A. Six years, sir.

Q. And during that period you were their metal-

(Testimony of William Wallace Clark.)

lurgist?      A. Chief metallurgist, yes, sir.

Q. Chief metallurgist; and they employed—they had a foundry, did they?

A. They had a foundry.

Q. And you were in charge of sand casting?

A. I was in charge of all production.

Q. And prior to that you worked in a rolling mill, didn't you? [1031]

A. I worked in a number of rolling mills.

Q. What was the product that was manufactured by the rolling mill?      A. Rolled steel.

Q. Was it a steel billet?

A. Partially rolled steel billets.

Q. Partially?

A. Billets, steel billets, are partially finished material.

Q. I understand; one of the products at the place you worked was a steel billet?

A. That was part of the process.

Q. And you are a doctor, aren't you?

A. Ph.D., yes.

Q. In what?

A. Chemistry and metallurgy.

Q. And how long have you been with Pittsburgh Testing Laboratory?

A. Since the spring of 1948.

Q. Since the spring of 1948?      A. Yes, sir.

Q. And prior to the spring of 1948, you were engaged in various jobs connected with the manufacture of steel products and metal products, were you?

(Testimony of William Wallace Clark.)

A. Prior to 1948 I was six years with Enterprise [1032] Engine and Foundry Company.

Q. What did they manufacture?

A. Steel, iron, brass and aluminum castings.

Q. By method of sand casting?

A. By method of sand casting.

Q. And did they manufacture cast steel billets?

A. Only once that I remember.

Q. Was that a—what size was that billet?

A. As I remember, it was 4 by 4 by 30.

Q. And you said it was poured flat on that occasion?

A. It was poured flat on that occasion.

Q. What was the end use of that?

A. I have no idea.

Q. Did you have any idea at the time?

A. I did not.

Q. Now, was that billet which you produced on that occasion of forging quality steel?

A. It was forging quality steel.

Q. And a cast steel billet, according to your understanding, is a forging quality steel?

A. Not necessarily.

Q. Not necessarily?           A. No, sir.

Q. Could it be?

A. It could be any kind of steel. [1033]

Q. Well, let me ask you right here just a little bit ahead of myself:

The cast steel billets which you instructed your inspector to inspect for Grace and Company, were

(Testimony of William Wallace Clark.)

those cast steel billets supposed to be of forging quality steel?

A. According to the specification A-17/29 they were called **forging or rolling quality**.

Q. So that the cast steel billet which your inspector was to inspect was of a forging quality?

A. Yes, sir.

Q. And if the end product was not of a forging quality steel billet, then it would not comply with the specifications; is that right?

A. I do not get the sense of your question.

Q. Well, I will repeat it.

If the final product, when completed, was not a cast steel billet of forging quality, then it would not comply with the specifications which you understood to have received from the Grace and Company for cast steel billets under ASTM A-17?

A. If the cast steel billets made by Seattle Foundry were of an analysis as prescribed in A-17/29, they would be of forging quality.

Q. I see. But the question is hypothetical: [1034]

If, actually, the product produced by Seattle Foundry was not forging quality, then it follows, doesn't it, Mr. Clark, that they would not comply with the specification you received from Grace and Company?

A. There is no evidence in my mind that the billets were not of forging quality.

The Court: Mr. Clark, in the hypothetical question you must assume the facts that are given in the question.



(Testimony of William Wallace Clark.)

In other words, in answering the question it isn't for you to determine what the evidence is.

Do you have that in mind?

Mr. Morrow: May the reporter read the question?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. But the question is hypothetical: If, actually, the product produced by Seattle Foundry was not forging quality, then it follows, doesn't it, Mr. Clark, that they would not comply with the specification you received from Grace and Company?")

Mr. Gantt: Objection, your Honor, on the grounds that that is based upon the assumption that the [1035] product produced was not of forging quality.

There is no testimony that they were not of forging quality.

The Court: This is cross-examination, Mr. Gantt. Objection overruled.

A. (Continuing): If the castings produced by Seattle Foundry were not forging quality, they would not comply with A-17/29. [1036]

\* \* \*

Q. (By Mr. Morrow): Assume again, Mr. Clark, that the product actually produced by Seattle Foundry was not a forging quality cast steel billet. The question is:

(Testimony of William Wallace Clark.)

Would that particular product comply with the instructions you received from Mr. Gips?

A. If the castings produced by Seattle Foundry was not a forging quality billet, they would not comply with the order as received from W. R. Grace and Company.

Q. And what do you understand that order to have been? A. To have cast steel billets.

Q. As per ASTM?

A. As per part of ASTM A-17/29.

Q. Mr. Clark, is it correct to assume that it isn't necessary for you to refer to the ASTM specifications in order to instruct an inspector what he should look for and what he should do in inspecting castings?

A. As there are several hundred—there is more than one thousand specifications under ASTM, and I cannot keep them all in my head at any time——

Q. (Interposing): I understand, but if [1037] the matter is simply a matter of sand casting, you know exactly what an inspector should look for in the matter of visual examination, do you not?

A. From my past experience I can instruct my inspectors without looking at ASTM.

Q. That information is not contained in ASTM, is it? A. It is not contained in ASTM.

Q. That is a matter, is it not, of the professional knowledge of the inspector? A. That is correct.

Q. And you yourself are an expert in connection with castings, are you not?

(Testimony of William Wallace Clark.)

A. I would not call myself an expert, but I have had plenty of experience.

Q. Yes; now, what would be your instructions, in reference to the instructions you gave Mr. Johnson in respect to casting, or to inspecting cast steel billets, you drew upon your personal experience and knowledge, did you not? A. I did.

Q. Now, assume—and I know that this is not what you feel the order to be, but just assume—that the order was for steel billets as per ASTM A-17/29 without any qualifications. [1038]

From your experience could you tell the inspector how to inspect? A. Yes, sir.

Q. And what would those instructions be?

A. His instructions would be to check the heat, the analysis, and surface inspection of the billets in the mill.

Q. Yes. Well, now, Mr. Clark, aside from the specific instructions that you gave to your inspectors in reference to determining inspection of steel billets or cast steel billets, does the inspector have the duty to see that the end product—that is, the finished product—is the product called for in the specifications? A. As near as——

The Witness: Could I have that repeated, your Honor?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: “Q. Well, now, Mr. Clark, aside from the specific instructions that you gave to

(Testimony of William Wallace Clark.)

your inspectors in reference to determining inspection of steel billets or cast steel billets, does the [1029] inspector have the duty to see that the end product—that is, the finished product—is the product called for in the specifications?”)

A. (Continuing): He is instructed to inspect the billets as called for in the specifications given.

Q. (By Mr. Morrow): Yes. And if—and is he required to refer to the order of the customer to see what the specifications are?

A. He never sees the order for the billets.

Q. That is, in your method of doing business your individual inspectors never see the order?

A. They never see the order. That is the customer's.

Q. Is it your function or business to see or examine the order, Mr. Clark?

A. Our work order?

Q. Yes; you, personally.

No, no, I am referring to the customer's order.

A. We never see the customer's order.

Q. You never see the customer's order?

A. No.

Q. Never?

A. Well, it is possible, but there is no [1040] reason to.

Q. Why is there no reason to?

A. Our client gives us orders to inspect in a certain manner, or to a certain specification; and if

(Testimony of William Wallace Clark.)

he would call for so many billets of A-17, or A-7, or A-15, we have no interest in what his original order called for. That is what the customer called for.

Q. Well, you would have an interest, wouldn't you, Mr. Clark, to the extent that you would want to know what he was designating—whether he was designating locomotive wheels, or structural steel, or something like that?

A. Can I give you an instance, please?

Q. Well, if you can, just answer the question, first, if you can.

A. We very seldom know the end use of the material that we inspect.

Q. Mr. Clark, I had no reference to trying to determine the end use. All I am referring to is a simple order from a customer to inspect steel billets or cast steel billets.

Now, what I am talking about is:

Do you or your inspectors receive that order? Do you know the contents of it?

A. We know the contents of the order as [1041] given by our client to us.

Q. So that it is important, is it not, for the inspector to know what the order is?

A. The order to us, yes.

Q. You said that you were in the export and import business at one time, Mr. Clark. What period was that?

A. Oh, that was partly from 1926 or 1927 to 1942.

(Testimony of William Wallace Clark.)

Q. Well, let's see, what would that be—ten to 15 years?      A. Approximately, yes.

Q. And where were you located?

A. San Francisco.

Q. And were you in business for itself?

A. Yes, sir.

Q. And what products did you deal in?

A. Oh, a number of products; partly automobiles, some steel, other products that we could find an order for.

Q. Was your business either chiefly import or export?      A. Mostly export.

Q. Mostly export?

A. Export was automobile, steel products, [1042] radios—oh, a number of different items that were needed in foreign countries.

Q. Well, in the export business it is necessary to have your contact with the customer abroad, I presume?      A. Yes, sir.

Q. And also to have suppliers which supply you with the export material?      A. Correct.

Q. And you conducted such a business, didn't you?      A. Yes, sir.

Q. Now, outside of steel products, when you—of soft materials, such as lumber and flour and so forth, did you have any personal knowledge of the—of whether or not the material as specified complied with specifications?

My question may not be intelligible. If it isn't, just say so.      A. It is not intelligible.

(Testimony of William Wallace Clark.)

Q. All right; I will try to rephrase the question.

You didn't always know exactly what was in the product you ordered in your export business to furnish customers? A. Exactly what was in it?

Q. Yes; well, now, tell me what products [1043] you bought besides steel?

Automobiles, you said. What else?

A. All right; automobiles, radios.

Q. Lumber?

A. No, I don't believe we ever exported lumber.

Q. Yes; flour? A. No flour.

Q. Any grain?

A. No grain. It was mostly manufactured articles.

Q. Most manufactured articles; were they according to specification?

A. Not necessarily according to specification. We would receive an inquiry, find a potential supplier, get samples, ship them over to the country, and quote a price.

Q. Did you deal in any commodities that had ASTM specifications or other standards?

A. On steel, yes.

Q. Well, now, you as an expert would be either familiar with the specifications set forth under ASTM, or would have ready reference to it?

A. I would have ready reference to it in the library.

Q. You didn't pretend to know what the speci-

(Testimony of William Wallace Clark.)

fications were under ASTM when you ordered products, [1044] did you?

A. If the product was ordered under an ASTM specification, it was necessary for me to know what the specification was.

Q. It was necessary? You considered it necessary? A. Yes, sir.

Q. Well, let's take steel billets as per ASTM specifications.

If you had received an order for steel billets as per ASTM specifications, would you have known what was included, offhand, in those specifications?

A. I would have—not have known offhand, no; but I could easily procure the information.

Q. Would it be necessary for you to procure the information in order to place an order with some supplier? A. It would——

Mr. Gantt (Interposing): Objection, your Honor, unless counsel can pin it down to what specification he is talking about.

Mr. Morrow: I am going on from this question.

A. (Continuing): It is not absolutely necessary if you are purchasing from a reputable firm. [1045]

Q. (By Mr. Morrow): Yes.

A. And quote the specification, and they give you a certificate, you are fairly safe.

Q. As a matter of fact, it is true, is it not, Mr. Clark, that the ASTM specifications are a standard upon which both the purchaser and the manufacturer can rely, in one ordering the product and the other selling the product? A. That is correct.



(Testimony of William Wallace Clark.)

Q. And isn't that what is usually done in connection with specifications under ASTM—that is, to refer to the ASTM specification numbers?

A. When it is referred to, that is the specification.

Q. Now, in connection with your conversation with Mr. Gips, Mr. Clark, I believe you said that Mr. Gips called you; is that correct? Mr. Gips called you?

A. Correct.

Q. And did he tell you that he had an order from New Zealand for steel billets?

A. He told me he had an order from New Zealand for cast steel billets.

Q. All right; that is what he told you?

A. Yes, sir. [1046]

Q. He said his order from New Zealand was for cast steel billets?

A. For cast steel billets.

Q. And did he say what the specifications were?

A. He told me they were A-17/29.

Q. And you, according to your testimony, looked up that reference and called him back, and said that the Foundry could not produce——

A. (Interposing): I called him back and——

Q. (Continuing): ——steel billets under ASTM A-17/29?

A. I called him back and told him the Foundry could not produce steel billets exactly in conformance to A-17/29; that that called for rolled and forged billets and they were furnishing cast steel billets.

(Testimony of William Wallace Clark.)

Q. Why did you tell him that the Foundry could not produce steel billets as per ASTM A-17/29?

A. Because ASTM calls for rolled and forged billets, and Seattle Foundry could not produce rolled and forged billets.

Q. But, as I understand, Mr. Clark, you said that Mr. Gips had already told you that the order was for cast steel billets as per ASTM A-17/29?

A. He told me——

Q. (Interposing): Just a minute. [1047]

A. O.K.

Q. You said that you called him back and told him that steel billets—that the Foundry could not manufacture steel billets as per ASTM A-17/29; so, isn't it true, Mr. Clark, that Mr. Gips must have said: "Our order from New Zealand is for steel billets of ASTM A-17/29"?

A. According to my notes, which I have here, he asked for cast steel billets. Otherwise, I would not have written it.

Q. Now, that is something different—your notes. Didn't you, on your deposition in California, tell me, Mr. Clark, that you knew what the order was from New Zealand?

A. Knew what the order was? Nothing except what Mr. Gips told me.

Q. And didn't you say you knew it was for steel billets as per ASTM A-17/29 specifications?

A. That was the request by Mr. Gips, the information given by Mr. Gips, that they were to comply with A-17/29.

(Testimony of William Wallace Clark.)

Q. Yes; he told you and you knew, didn't you, Mr. Clark, that the New Zealand order was for steel billets for certain—750 of a certain dimension, and 50 of another dimension, as per ASTM [1048] A-17/29?

A. I knew it was for billets, yes, sir.

Q. He told you on the first day, did he not, that you talked to him, that the steel was ordered by the New Zealand Government Trade Commissioner, and that the order was for 750 billets 9½ inches by 4 inches by 4 feet, and Type A, Grade 2; and 50 billets, both of ASTM specifications?

A. Yes, sir.

Q. That is all he told you?

A. Yes, sir; just as I wrote it in my notes.

Q. Now, as I understand your further conversation with Mr. Gips, when you first heard of the order, that Mr. Gips told you he had from the New Zealand Trade Commissioner, I understand by your testimony that he also told you that the Foundry was going to manufacture these steel billets; is that correct?

A. That is correct.

Q. And now, as I understand, he having told you that the steel billets required to fill the order to the New Zealand Government Trade Commissioner required ASTM A-17/29; you then went to your specifications, and you had to go to the library; is that correct?

A. That is correct.

Q. And after reading and examining the specifications you determined, according to your testi-

(Testimony of William Wallace Clark.)

mony, for [1049] the first time that the steel billets as required would require forging and rolling?

A. That is the intent of the specification.

Q. And you called Mr. Gips, and you told him, as you have said upon your cross-examination already, that the Foundry cannot manufacture steel billets; that they can manufacture only cast steel billets, "and that is all we can inspect for." Is that——

A. (Interposing): That is correct.

Q. (Continuing): ——the substance of the talk?

A. That is the substance of the talk.

The Court: I think we will take a recess now.

Court will recess now for fifteen minutes.

(Whereupon, at 11:02 o'clock, a.m., a recess was had in the within-entitled and numbered cause until 11:22 o'clock, a.m., December 8, 1955, counsel heretofore noted being present, the following proceedings were had to wit:)

Mr. Morrow: May we have the last question and answer read back, your Honor?

The Court: The reporter will read the question and answer.

(Whereupon, the following was read [1050] by the reporter:)

"Q. And you called Mr. Gips, and you told him, as you have said upon your cross-examination already, that the Foundry cannot manufacture steel

(Testimony of William Wallace Clark.)

billets; that they can manufacture only cast steel billets, 'and that is all we can inspect for.' Is that the substance of the talk?

"A. That is the substance of the talk."

Q. (By Mr. Morrow): Mr. Clark, would you define for me the term "ingot" and terms "cast steel billet" and terms "steel billet"?

Do you want to take them one at a time?

First, ingot?

A. An ingot is a casting of steel, generally of considerable size.

Q. All right; what is a billet?

A. A billet is a smaller item of steel, and can either be rolled or forged or cast. It is generally—the general nomenclature is under a certain size.

Q. What is a cast steel billet?

A. A cast steel billet is the same as a rolled steel billet, except for the fact it hasn't been rolled or forged.

Q. Now, if you had an order for the manufacture— [1051] to inspect steel billets at Isaacson Iron Works, what would your inspection consist of?

A. It would consist of checking the analysis of each heat, the surface condition of the billets, to see that they were properly marked.

Q. Is that all?

A. After the billets are made that is all you can do.

The Court: Before you go on, I want to get the first part of the question.

(Testimony of William Wallace Clark.)

(Whereupon, the following was read by the reporter:)

“Q. Now, if you had an order for the manufacture—to inspect steel billets at Isaacson Iron Works, what would your inspection consist of?

“A. It would consist of checking the analysis of each heat, the surface condition of the billets, to see that they were properly marked.

“Q. Is that all?

“A. After the billets are made, that is all you can do.”

Q. (By Mr. Morrow): Now, if you had an order to inspect steel billets at Seattle Foundry, what would your inspection consist of? [1052]

A. Inspection at Seattle Foundry would be analysis, surface inspection, and the size, considering the fact that this order called for specific sizes.

Q. So that the order to your inspector, whether it would be either the inspection of material produced by the Foundry or by Isaacson's forging shop, would be practically the same, wouldn't it?

A. Practically the same, in view of the fact that when you are inspecting billets you assume that they have already been formed.

Q. Now, you have defined the terms “ingot,” and “cast steel billets,” and “billets”; would a layman, in your opinion, recognize the distinction in terms?

A. Assuming he knew nothing about steel?

Q. Yes.

(Testimony of William Wallace Clark.)

A. Assuming he knew nothing about steel, he would not know the difference.

Q. Now, when you had this telephone conversation with Mr. Gips—that is, the first one you state was on May 16th—did you ask Mr. Gips if he understood the difference in those terms that were being used?

A. I knew of no reason to do so.

Q. So that your answer is you didn't?

A. I did not.

Q. Did Mr. Gips ask you what the difference was? [1053]

A. He gave me no indication that there was any difference.

Q. Did he give you any indication that he knew anything about the steel business? A. No, sir.

Q. Was the fact disclosed to you that Grace and Company were exporters at that time by Mr. Gips?

A. It was not disclosed to me, but I have known W. R. Grace and Company for many years.

Q. You knew that? A. Yes.

Q. Did you know what the chief items were that Grace and Company dealt with during that period?

A. No, sir.

Q. Were you familiar with the fact that it was chiefly lumber? A. No sir.

Q. Now, would it have been important in this case, Mr. Clark, for you to have known that the end use of the steel billets required by New Zealand was for the manufacture of locomotive parts?

A. The end use is very seldom disclosed to us.

(Testimony of William Wallace Clark.)

Q. But that isn't the question.

Would it have been important in this case?

A. I do not see the importance. [1054]

Q. Well, didn't you tell me in San Francisco that if you had known that the end use was for locomotive—that the end use was for use of parts of locomotives, that you would have told Grace and Company to place the order some place else?

Mr. Gantt: Objection, your Honor, unless counsel cares to read from the deposition.

Mr. Morrow: I am asking if he didn't tell me that.

A. I told you something along that line. However, I have heard the deposition by New Zealand, and they used these steel billets for the purpose for which they were intended.

Mr. Morrow: I move that the voluntary remarks of the witness be stricken.

The Court: The last portion of the answer will be stricken.

Q. (By Mr. Morrow): Mr. Clark, I will ask you again, would it have been important in this case, and didn't you tell me that it was important in this case, to have known the end use of these billets? But that it was no concern of yours?

A. It was no concern to us what the end use was.

Q. But don't you agree that to have known the [1055] end use now that everything has been disclosed would have been the important factor in making the inspection?

Mr. Gantt: Objection, as calling for conjecture.



(Testimony of William Wallace Clark.)

The Court: I don't feel it is material.

Mr. Gantt: And immaterial.

The Court: Objection sustained.

Mr. Morrow: I think it is material, your Honor. This is a matter of cross-examination. It has already been stated by his expert, who thought it was important to know the end use.

The Court: The question as you framed it was as to the matter at the present.

Mr. Morrow: The objection is to the form of the question?

The Court: And to the substance after it was concluded.

Mr. Morrow: Yes; I see.

Q. (By Mr. Morrow, continuing): Mr. Clark, had you known that the end use of the steel billets required by New Zealand was for the manufacture of parts of locomotives, would it have made any difference in your accepting the Grace order?

Mr. Gantt: Objection as immaterial and [1056] irrelevant.

The Court: Objection overruled.

A. Will you specify what part of the locomotive it is to be used for?

Q. (By Mr. Morrow): Well, just answer the question. I can't specify.

A. I cannot answer the question, then.

Q. You mean that you would have to know the particular part? A. Certainly.

Q. Well, assume it was for a motion part.

(Testimony of William Wallace Clark.)

A. Assuming it was for a motion part, which is generally an alloy steel and a very good steel——

Q. (Interposing): Yes. Now, if you had known that New Zealand required it for such a use, would that have made any difference in accepting the Grace order?

A. We would have accepted the order to inspect after warning Grace and Company that they were getting cast steel billets. These billets could still have been forged down to a smaller part, and would have been exactly the same as had they furnished rolled or forged billets.

Q. Mr. Clark didn't you state in your [1057] deposition in San Francisco that if you had had the information that the steel billets were required for motion parts of locomotives, that you would have told Grace to place the order some place else?

Mr. Gantt: Objection, your Honor.

I think that if counsel is going to impeach the witness by deposition the witness should be shown the page of the deposition.

The Court: Do you wish to see the deposition?

The Witness: Yes, sir.

Mr. Morrow: May I have that question?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Mr. Clark, didn't you state in your deposition in San Francisco that if you had had the information that the steel billets were required for motion parts of locomotives,

(Testimony of William Wallace Clark.)

that you would have told Grace to place the order some place else?")

The Court: Do you have a page number there, Mr. Morrow?

Mr. Morrow: I will give it in a minute, your Honor. [1058]

(Whereupon, there was a brief pause.)

The Witness: Page 49.

Q. (By Mr. Morrow): What page?

A. 49.

Q. Have you read your deposition recently, Mr. Clark? A. I have, sir, just now.

Q. Now, I will ask you if this was the question put to you and the answer given:

"Q. Well, if you had ever asked Mr. Gips what the billets were for, and he had told you that they were for parts of locomotives in New Zealand, would you have advised him that so-called cast billets would not be acceptable?

"A. Had he told me that the end use was for parts of locomotives, I would have told him to place the order some place where he could get rolled or forged billets."

A. That is what I testified.

Q. Now, can you answer this question, which I put to you before:

Is it important for an inspector to know the use to which the product is going to be put?

A. He very seldom knows the end use. [1059]

Q. Now, it would have been important in this case, would it not, Mr. Clark?

(Testimony of William Wallace Clark.)

A. That would have been up to Mr. Gips.

Q. Just a minute. Answer the question.

It would have been important in this case for the inspector to have known the end use of the steel billets for New Zealand?

A. I do not say that it was important for the inspector to know it.

Q. Now, I think you said in your direct examination, Mr. Clark, in reference to Defendant's Exhibit A-1, that those were your notes.

Do you have them before you?

A. The yellow sheets.

Q. You say you always make notes, don't you?

A. Yes, sir.

Q. And you always—and you said you put down what Mr. Gips told you in your notes?

A. Yes, sir.

Q. And did you put everything down?

A. I would not say that anything of any importance——

Q. You put down anything of any importance in your notes?

A. Important to us, yes, sir. [1060]

Q. Important to you? A. Yes, sir.

Q. Well, now, the fact that the order of Mr. Gips called for cast steel billets which were not rolled or forged would be a qualification to the specification, ASTM A-17/29 specification, would it not?

A. That is correct.

Q. And if Mr. Gips agreed to that, you would certainly have put that important matter in your

(Testimony of William Wallace Clark.)

notes, wouldn't you?      A. Not necessarily.

Q. Did he tell you that? Did you tell him that, I should say; and did he agree?

A. I told him that the cast steel billets would not conform to A-17/29 in its entirety, and that he was getting cast steel billets, and he agreed—that is, he had placed the order with Seattle Foundry. That is what he had an order for.

Q. Now, is there anything in your notes that sets forth that conversation with Mr. Gips on that occasion?

A. The only thing in my notes are the important facts pertaining to the order.

Q. And the part which you referred to is your description, is it, "200 tons cast steel billets approximately divided"? [1061]

A. No, the 200 tons approximately divided. The comma is in there.

Q. And what is there about these notes of yours which sets forth your conversation with Mr. Gips in respect to the qualification that the steel billets were not to be rolled or forged?

A. Nothing in that note except that they are cast steel billets.

Q. Now, you say that you made these notes on May 16, 1952?      A. Yes, sir.

Q. And how do you fix that date?

A. I fix that date from Mr. Robinson's date on his notes. I had not dated my sheet.

Q. You had taken your notes prior to Mr. Robinson's notes?      A. Yes, sir.

(Testimony of William Wallace Clark.)

Q. Now, how do you fix it as being the same date as Mr. Robinson's notes?

A. I had taken my notes in to Mr. Robinson to request him to write the order, and also on the next day, May 17th, I wrote a letter to our Seattle office, telling him to start the inspection.

Q. Well, now, Mr. Clark, I would like to have you explain this, if you can: [1062]

Mr. Gips wires his Seattle office on May 15th that the inspection was to be made by Pittsburgh Testing Laboratory.

In addition, he wrote a letter on May 15, 1952, advising that the inspection would be made by Pittsburgh Testing Laboratory.

Now, can you explain how he would have that understanding on May 15th, if he had not talked to you until May 16th?

A. I can make no explanation, and I do not have any sheet dated. I fix the dates only by circumstantial evidence with Mr. Robinson and my letter of May 17th.

Q. And I understand that that circumstantial evidence is that you handed your notes to Mr. Clark prior to the time of taking his notes on the 16th?

A. To Mr. Robinson.

Q. To Mr. Robinson—thank you for the correction.

A. I handed them to him immediately after writing them.

Q. Now, then, the only explanation there for such a situation of Grace entering into a contract

(Testimony of William Wallace Clark.)

with Foundry and having advised Pittsburgh would make the inspection in a wire letter on the 15th would be that [1063] you had taken your notes on the 15th or prior to the 15th—is that not correct?

A. It would seem so from his letter, but I fix the date as the 16th.

Q. But you concede you may have made these notes on the 15th; is that right?

A. I don't think so.

Q. At least, you concede they were prior to Mr. Robinson's notes?

A. They were prior to Mr. Robinson's notes.

Q. You stated that you called Mr. Johnson on the 17th to give him——

Mr. Gantt: Objection.

Mr. Savage: 16th.

Q. (By Mr. Morrow, continuing): Was it the 16th? A. I called Mr. Johnson——

Q. (Interposing): Oh, you wrote your instructions on the 17th. How do you fix the date you called Mr. Johnson on the 16th?

A. I fix the date immediately after having conferred with Mr. Robinson on my notes and called him immediately afterwards.

Q. As I get the sequence of events, then, whether your first call to Mr. Gips was the 15th or [1064] the 16th, that you took your notes first, that you went to Mr. Robinson and he wrote up his notes, and you told him what the order was, didn't you?

A. I gave him my notes.

(Testimony of William Wallace Clark.)

Q. And you talked it over with Mr. Robinson, and you called Mr. Johnson, is that the sequence?

A. That was the sequence.

Q. Now, did Mr. Robinson make up his notes from you personally? A. No, sir.

Q. I believe that he testified on examination by me that he wrote up his notes from what you told him.

A. I believe he testified he wrote up his notes from my notes and our conversation.

Q. And your conversation; but it was not done in your presence.

Now, I hand you what are Mr. Robinson's notes, No. 67, Plaintiff's Exhibit 67; have you seen this exhibit before, the notes? A. Yes, sir.

Q. When did you see it?

A. I have no memory.

Q. You have no memory?

A. When I saw it exactly I do not know.

Q. Well, your memory in respect to time [1065] isn't important, Mr. Clark, as to the specific dates; but do you recall whether you saw this during the period of time shortly after Mr. Robinson wrote the notes?

A. Shortly afterwards, yes, sir. I don't know the exact time.

Q. You cannot say the exact time. Was it one or two days? A. It could be.

Q. But your memory isn't very good when it goes back that far, is it?

A. Not too good after three years.



(Testimony of William Wallace Clark.)

Q. And Mr. Gips may have been telling the truth when that telephone call was between the 12th and the 15th; that is possible?

A. I only fix it by our notes.

Q. Now, Mr. Clark, in examining these notes which you state were written up from your order or your telephone notes and conversation with—which you had with Mr. Robinson, I don't see anything in there which would indicate to me that there was any qualification in the ASTM A-17/29 specifications; and I will ask you if you can point out to me or the Court where there is such a qualification to that specification?

A. There is no qualification in this—in these notes of Mr. Robinson's. [1066]

Q. Yes.

A. Which were written up for office work.

Q. Now, doesn't it follow, Mr. Clark, that with such an important qualification in the order of Grace and Company that that would have been a subject of notes both by you and Mr. Clark, in your notes and his notes?

A. There is qualification. I have written "cast steel billets."

Q. And that is all?           A. That is all.

Q. Very well. You have a formal work order, do you, Mr. Clark, which you send to your inspecting offices?           A. Yes, sir.

Q. Now, I take it that your testimony is that you turned the matter over to Mr. Robinson, and he processed the formalities that the Pittsburgh office

(Testimony of William Wallace Clark.)

requires in starting a job, and that part of that is the making of a formal inter-office work order. Am I correct in that? A. That is the procedure.

Q. And I am handing you Defendant's Exhibit A-7, and ask if this is such a formal work order, and was the one prepared by Mr. Robinson on this occasion? [1067]

A. That is the—a formal order, our number S.F. 5799.

Q. You had nothing to do with that, had you?

A. I had a certain amount to do with it, yes. When any one of these orders are made up, if the office manager does not have sufficient information, she will inquire of me for the details.

Q. Did you on this occasion have any details which you supplied to the order?

A. No, except that I have got 800 billets, approximately 200 tons, marked cast steel, and the size of the billets, and so forth.

Q. Have you got the specifications listed?

A. The specifications are listed ASTM A-17/29.

Q. Yes. Now, Mr. Clark—thank you—did this formal order come over the desk, come over your desk before it went to Seattle?

A. That I would not remember.

Q. Well, now, if it had, and you had observed the specifications as listed in the formal order were for specification ASTM A-17/29, you would have made the proper qualification that the inspection was to be of cast steel billets, wouldn't you?

A. It says cast steel billets on it.

Q. But that is in respect to quantity, [1068]

(Testimony of William Wallace Clark.)

isn't it. Doesn't it say, "800 billets, 200 tons cast steel"?      A. 200 tons is cast steel.

Q. Yes.

A. 800 billets; approximately 200 tons of cast steel.

Q. Is it your contention then that this part of the estimated quantity reading "800 billets, 200 tons cast steel" is a qualification and a deviation of that part which appears under the specification for ASTM A-17/29?

A. That is a work order between the offices and all details have been given to the Seattle office, both in my phone call of May 16th, and also my letter of May 17th.

I don't see that it is necessary to put it in the work order between the offices.

Q. I see. So that it isn't in there, is it?

A. No, sir.

Q. Now, I understand that you didn't consider that important because you called Mr. Johnson and you told him on the phone on the 16th that there was this qualification?      A. I did.

Q. Now, these conversations between you [1069] and Mr. Gips: Will you state what period of time they were?

You have stated.

Mr. Morrow: Strike my question, please.

Q. (By Mr. Morrow, continuing): You have indicated, Mr. Clark, that your conversations with Mr. Gips pertaining to his request for an inspection, and your acceptance of the order, was on May 16th?

(Testimony of William Wallace Clark.)

A. To the best of my knowledge.

Q. Now, was there any conversation subsequent to that time in reference to the terms of the agreement between yourself and Mr. Gips in respect to this work order?

A. There was no further conversation with Mr. Gips that I remember.

Q. In respect to those particular things?

A. To those particular items. That had been agreed upon at our first conversation.

Q. Had all of your conversations in respect to Mr. Gips' request for an inspection, and your quoting him rates and your—and his authorizing the inspection taken place prior to May 21, 1952?

A. That had taken place prior to May 21st.

Q. Now, no subject of your conversation with Mr. Gips, Mr. Clark, was that Mr. Gips' order should [1070] be confirmed in writing, was it?

A. I don't remember that I requested him to confirm it in writing.

Q. Well, I notice this is the situation in respect to Mr. Robinson's notes:

Now, you gave him your notes and you told him about Mr. Gips' order and the information contained in Plaintiff's Exhibit 67, is, "Gips will give us letter."

Now, I will refer that part to you—"Gips will give us letter." A. Yes?

Q. Was that the information you got from Mr. Gips?

(Testimony of William Wallace Clark.)

A. It may have been; I do not so remember.

Q. Well, I believe you told me that in San Francisco, but you don't recall now, do you?

A. I do not recall.

Q. By the way, did Mr. Gips confirm the order via letter? A. We received a letter from him.

Q. Did he confirm his order by letter?

A. If you can call it that, yes, sir.

Mr. Morrow: Yes. May I have Plaintiff's Exhibit 21?

(Whereupon, document was handed to [1071] counsel by the Clerk.)

Q. (By Mr. Morrow): Referring you to Plaintiff's Exhibit 21, being a letter of May 20, 1952, is that what you understand to be Mr. Gips' confirmation of the order of Grace and Company to Pittsburgh?

Mr. Gantt: Objection, your Honor, to the use of the word "confirmation." It is a legal conclusion.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Referring you to Plaintiff's Exhibit 21, being a letter of May 20, 1952, is that what you understand to be Mr. Gips' confirmation of the order of Grace and Company to Pittsburgh?")

Mr. Gantt: And, in addition, the letter speaks for itself.

The Court: Well, there has been some testimony here regarding confirmation in writing.

(Testimony of William Wallace Clark.)

If the witness says he has no present recollection, and Mr. Gips says here it is confirmed, it seems to me it is a rather tenuous situation on which you are basing your question.

Mr. Morrow: I meant to bring that out, [1072] and I will attempt to do so, if your Honor please.

Q. (By Mr. Morrow, continuing): Referring you to Plaintiff's Exhibit 57, and this statement, "Gips will give us letter," does that refresh your recollection, Mr. Clark, that either you requested Mr. Gips to give you a letter confirming your conversations and the Grace order, or that either one of you suggested it?

A. I may have. I don't have any present recollection of it. It is more or less procedure.

Q. Yes. Now, had Mr. Robinson talked to Mr. Gips prior to Mr. Robinson's making his notes?

A. Not that I know of.

Q. You gave him all the information which he put down in his notes?

A. I gave him the information in my notes.

Q. So that you gave him the information that Gips would send a letter?

A. If that is the recollection. I don't know that I told him that.

Q. Is that the letter?

A. This is the letter, but this is a conversation——

Q. (Interposing): Just a minute. You have answered the question. That is the letter. [1073]

Now, then, did that letter come over your desk?

(Testimony of William Wallace Clark.)

A. Yes, sir.

Q. When did it come over your desk?

A. May 21st.

Q. Did you reply to that letter?

A. No, sir.

Q. Did Mr. Robinson reply to the letter?

A. I believe he sent out the usual form of acknowledgment of receipt of a letter.

Q. Well——

Mr. Morrow: Plaintiff's Exhibit 22?

(Whereupon, document was handed to counsel by the Clerk.)

Q. (By Mr. Morrow, continuing): Showing you Plaintiff's Exhibit 22, is that Mr. Robinson's letter acknowledging Mr. Gips' letter?

A. That is.

Q. And did that come over your desk approximately the time it went out?

A. Not necessarily.

Q. How long afterwards?

A. Probably after the claim started.

Q. Yes. Now, I think you were going to [1074] say, Mr. Clark, that that letter of Mr. Gips of May 20th didn't do something.

Now, what didn't it do? I may have misunderstood. I cut you off.

A. I know you did.

Q. Now, what were you going to say?

A. I was going to say that this confirmed the conversation between Mr. Robinson and Mr. Gips.

(Testimony of William Wallace Clark.)

Q. Yes. Well, does it? Was that what you were going to say?

A. That is what I was going to say.

Q. Now, you understand there was a conversation between Mr. Gips and Mr. Robinson?

A. This letter says so. I don't know what the conversation was.

Q. Now, does that letter include your understanding with Mr. Gips pursuant to the details of your employment by Grace?

A. I would state——

Mr. Gantt (Interposing): Objection, your Honor. The letter speaks for itself.

A. (Continuing: ——the letter was written to Pittsburgh Testing Laboratory on the first conversation between Mr. Gips and Mr. Robinson.

The Court: The question is: Does that [1075] letter which you are referring to now—is that Exhibit 21?

The Witness: Yes.

Mr. Morrow: May we have the question and answer read back, your Honor?

The Court: The reporter will read the question and answer.

(Whereupon, the following was read by the reporter:)

“Q. Now, does that letter include your understanding with Mr. Gips pursuant to the details of your employment by Grace?

“A. I would state the letter was written to



(Testimony of William Wallace Clark.)

Pittsburgh Testing Laboratory on the first conversation between Mr. Gips and Mr. Robinson.”

The Court: What is your objection, Mr. Gantt?

Mr. Gantt: That the letter speaks for itself.

The Court: He is asking whether it states his understanding.

It isn't asking him what the letter states itself. You take it that there can be no question about the letter or the statement in the letter, I mean?

Mr. Gantt: No, your Honor, but the letter, whatever the words are, written there, it is in the letter. [1076]

The Court: Of course, I recognize that if it is a contract the language is controlling, but I don't believe the Court should prevent a witness from stating his understanding for whatever purpose it may serve.

I will overrule the objection.

Q. (By Mr. Morrow): Have you the question in mind, Mr. Clark?      A. Repeat it, please.

Mr. Morrow: Yes.

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: “Q. Now, does that letter include your understanding with Mr. Gips pursuant to the details of your employment by Grace?”)

A. This letter does not go into the details of the agreement between Mr. Gips and myself in regard to the inspection. It is just a general letter.

Q. (By Mr. Morrow): Thank you. Mr. Clark, I

(Testimony of William Wallace Clark.)

believe you said that about 10 days or two weeks after your first conversation with Mr. Gips you heard from him again, and was there a discussion at that time about the method by which Seattle Foundry intended to manufacture [1077] these cast steel billets?

A. I don't remember any conversation about Seattle Foundry's method.

Q. I see.

Mr. Morrow: May I have 24, please?

(Whereupon, document was handed to counsel by the Clerk.) [1078]

\* \* \*

(Whereupon, the following was read by the reporter:)

“Q. Mr. Gips has indicated in his testimony that at about May 20, 1952, he received a letter from his Seattle office which enclosed this letter of May 16, 1952, from Seattle Foundry, and you have testified that that letter did not—that you hadn't seen it before until at least after the claim arose.

“Now, what I would like to know, Mr. Clark—would you like to read it? You can read it, sir.”

Q. (By Mr. Morrow, continuing): Whether the contents of Mr. Schlaugh's letter and Mr. Murphy's letter was a subject of discussion between yourself and Mr. Gips?

A. Not that I remember.

Q. You did remember, however, that you had an inquiry from Mr. Gips concerning what the taper—

(Testimony of William Wallace Clark.)

what taper would be allowed in drawing the pattern out of the sand?

A. Mr. Gips called me and wanted to [1079] know what taper—how much taper is allowed in drawing the pattern out of the sand.

Q. Yes. Now, the exhibit—this Plaintiff's Exhibit 24, inquiry from the Seattle office, was answered by Mr. Gips on May 22, 1952, in which he advised——

Mr. Morrow: May I have 25?

The Court: Exhibit 25?

Mr. Morrow: I think I would like to finish, if I might.

(Whereupon, document was handed to counsel by the Clerk.)

Q. (By Mr. Morrow, continuing): ——advised the taper that would be permitted to draw the product out of the sand.

Now, what I want to ask you is:

Is it possible, Mr. Clark, that your conversation took place between the time of Mr. Gips' inquiry, which you received on May 20, 1952, and the time that you replied to his office on May 22, 1952?

A. It probably did.

Q. So that you may have been mistaken when you said that the subject of this conversation [1080] occurred ten days or two weeks after?

A. I said I did not remember. It might have been ten days or two weeks. [1081]

(Testimony of William Wallace Clark.)

The Court: You may proceed, Mr. Morrow.

Q. (By Mr. Morrow): Mr. Clark, you have testified that after your conversation with Mr. Gips on or about May 16, 1952, that there was some question raised by him with respect to taper and chipping? A. Yes.

Q. That is correct, isn't it? A. Yes, sir.

Q. Between the time of the conversation on May 16th, and the time the New Zealand claim arose in 1953, that is, prior to the New Zealand claim, where were the conversations with Mr. Clark in reference to technical matters involving the method of production of the cast steel billets?

(Whereupon, there was a brief pause.)

Mr. Morrow: Will you strike that question, and let me rephrase it.

Q. (By Mr. Morrow, continuing): You have testified in respect to your conversations on May 16th and I have no reference to those now. I am talking about subsequent conversations that you had with Mr. Gips, in which you have mentioned that questions were raised with respect [1082] to chipping and tapering.

In connection with all those subsequent conversations which occurred prior to the time of the New Zealand claim, the question is whether or not all of those conversations related to the method of manufacture of the product at Seattle Foundry?

A. That would include method of manufacture and also what limitation or what limits were to be

(Testimony of William Wallace Clark.)

used in chipping the billets for further forging or rolling.

Q. That was the information——

A. (Interposing): Information; and there was one other one on chemical analysis.

Q. Now, I hand you Plaintiff's Exhibit 47, which is a letter of May 22, 1953, from Mr. Gips to Pittsburgh Testing Laboratory, attention Mr. Robinson.

Did this letter come to your attention?

A. Yes, sir. It is my signature.

Q. You have an initial there?           A. Yes.

Q. And attached to that is the letter of May 15, 1953, from New Zealand Trade Commissioner to W. R. Grace, setting forth their claim, or complaint?           A. Yes, sir.

Q. And that likewise came to your [1083] attention?           A. Yes, it came to my attention.

Q. And now, referring you to Plaintiff's Exhibit 47, being a letter of June 4, 1953, from Mr. Gips to Pittsburgh Testing Laboratory, did that letter and those enclosures come to your attention?

The Court: Didn't you just inquire about number 47?

Mr. Morrow: The other was 46.

The Court: 46; all right.

Mr. Morrow: I am sorry. I may have misspoken myself. The first one was 46.

Q. (By Mr. Morrow, continuing): Is that your initial?           A. That is my initial.

Q. So that in respect to both 46 and 47, they came to your attention about that time; is that cor-

(Testimony of William Wallace Clark.)

rect?           A. About that time, yes, sir.

Q. Now, my questions are directed to this period in May and June, 1953. That is after the New Zealand claim arose, Mr. Clark.

Did you see Mr. Gips during that period of time?

A. Mr. Gips came over to our place, and he had a conference with Mr. Robinson with regard to the claim. [1084]

Q. And did you talk to him, or see him?

A. That is out of my jurisdiction, on claims.

Q. Well, the answer is that you didn't see or talk to Mr. Gips?

A. I may have talked to him, but as far as discussing the claim, that is out of my jurisdiction.

Q. Is that when you met him for the first time?

A. That was the first time that I had met Mr. Gips.

Q. Now, naturally the subject under discussion at that time was the New Zealand claim, was it not, Mr. Clark?           A. It would be.

Q. And did you have discussion with Mr. Robinson concerning the New Zealand claim at that time?

A. Necessarily.

Q. You reviewed the New Zealand claim, did you, at that time?           A. Yes.

Q. And did you consult your ASTM A-17/29 specifications?           A. Yes, sir.

Q. Was there a steel shortage during that period of time, or shortly before, Mr. Clark? [1085]

A. You mean 1952 or 1953?

Q. 1952 and 1953.

(Testimony of William Wallace Clark.)

A. In 1952 there was definitely a steel shortage. It had eased up considerably in 1953.

Q. Was there a steel shortage at the time you received your order from Mr. Gips?

A. That I don't remember.

Q. There could have been?

A. There could have been.

Q. Now, your experience had been, had it not, Mr. Clark, that during the steel shortage cast steel billets which had not been subsequently rolled or forged were accepted by purchasers in lieu of the rolled or forged billets?

A. Yes, in certain cases. [1086]

\* \* \*

“Q. So far as the order of New Zealand was concerned, that inasmuch as the product was to be produced at the Foundry, it had to be assumed that the product desired by New Zealand was cast steel billets?”

A. I don't remember telling him that. [1087]

Q. That was——

A. (Interposing): That he had ordered cast steel billets in the first place; I wouldn't assume.

Q. Now, in your discussion with Mr. Robinson after the claim arose, did you tell Mr. Robinson that it was common during a serious steel shortage to accept cast billets which would otherwise conform to ASTM specifications?

Mr. Gantt: Same objection, your Honor.

The Court: I don't see how what he told Mr.

(Testimony of William Wallace Clark.)

Robinson would be material. You haven't a letter signed by Mr. Clark, have you?

Mr. Morrow: No, your Honor, but I can ask first a preliminary matter if Mr. Clark assisted in replying to Grace and Company in connection with this New Zealand claim.

Q. (By Mr. Morrow, continuing): Would you answer that, Mr. Clark?

A. I do not know that I assisted in performing—in conforming that letter, but Mr. Robinson and I probably talked it over.

Q. That is right; and you probably told Mr. Robinson at that time, didn't you, that by strict interpretation of the ASTM specification A-17/29, that [1088] cast billets without subsequent rolling or forging would not comply?

Mr. Gantt: Objected to as immaterial and irrelevant.

The Court: I will sustain the objection unless there is some other showing made.

Mr. Morrow: Pardon me?

The Court: Unless there is some other showing on materiality.

Mr. Morrow: I understand.

Q. (By Mr. Morrow): Isn't that the time you and Mr. Robinson went into the question of specifications to determine in what respects the claim of the New Zealand Government would be valid or invalid?

Mr. Gantt: Objected to as immaterial and irrelevant.



(Testimony of William Wallace Clark.)

Mr. Morrow: Well, I am trying to develop something, your Honor.

The Court: If it is preliminary, I will overrule the objection.

Mr. Morrow: May the reporter read the question?

The Court: The reporter will read the question. [1089]

(Whereupon, the following was read by the reporter: "Q. Isn't that the time that you and Mr. Robinson went into the question of specifications to determine in what respects the claim of the New Zealand Government would be valid or invalid?")

The Court: You are referring now to a conversation he said he probably had?

Mr. Morrow: Yes. I am referring to their consideration of the New Zealand claim, which Grace had asked them to consider, and to give them a reply on.

A. We may have talked it over to that extent, but there was no question in our minds but what the New Zealand Government got what they had ordered.

When we received this claim, it was our first knowledge that there was any difference.

Q. (By Mr. Morrow): And you were the one—you were the technical steel man in Pittsburgh at that time, weren't you?      A. Yes.

(Testimony of William Wallace Clark.)

Q. And didn't Mr. Robinson consult you for technical knowledge concerning the New Zealand claim?

A. That was not a technical job. It was more of a legal job than technical. [1090]

Q. But the question is, didn't Mr. Robinson consult you?

A. He probably talked to me, yes, sir.

Q. Concerning the technical matter which arose in connection with the New Zealand claim?

A. He wouldn't ask me the legal end; that is his part of the business.

Q. And at that time didn't you furnish to Mr. Robinson this explanation, or the explanation as contained in Plaintiff's Exhibit 19, which is the reply of Pittsburgh Testing Laboratory to Plaintiff's Exhibits 46 and 47? [1091]

\* \* \*

Mr. Gantt: I will make the same objection, your Honor, that this is beyond the scope of direct examination, completely and wholly outside the direct examination.

The Court: Well, of course, some things may be outside the scope. I will permit the answer, subject to a motion to strike.

Q. (By Mr. Morrow, continuing): You did furnish the information, didn't you, Mr. Clark?

A. I will not say I furnished all the information. We may have discussed it one way or the other, but I don't remember having furnished Mr.

(Testimony of William Wallace Clark.)

Robinson any information that he would not know himself.

Q. Now, Mr. Clark, you have stated that the subject of whether the billets should be rolled or forged was a subject of your discussion of May 16, 1952, and is it possible that your discussions that the billets should be rolled or forged first came up in conversations [1093] between you and Mr. Robinson, or you and Mr. Gips, after receipt of the New Zealand claim?

A. From your question do I infer that the billets were to be subsequently rolled and forged?

Mr. Morrow: May the reporter read the question?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. Now, Mr. Clark, you have stated that the subject of whether the billets should be rolled or forged was a subject of your discussion of May 16, 1952, and is it possible that your discussions that the billets should be rolled or forged first came up in conversations between you and Mr. Robinson, or you and Mr. Gips, after receipt of the New Zealand Claim?")

A. (Continuing): There was no such idea in mind after the claim, because we knew that they were receiving cast steel billets in the first place, and that was what was ordered.

Q. In your discussion with Mr. Robinson and perhaps with Mr. Gips in May and June, 1953, you

(Testimony of William Wallace Clark.)

had under consideration whether the billets required by [1094] New Zealand were required to be rolled or forged; did you not?

A. That they intended them to be rolled or forged?

Q. Yes.

A. After we got their claim we knew they had intended them to be rolled or forged.

Q. Yes. Now, isn't it true, Mr. Clark, that for the first time in this case you made a critical examination of ASTM A-17/29 and discovered that the billets required by New Zealand were a semi-finished steel product requiring rolling and/or forging?

A. I made a critical examination on May 16, 1952.

Q. That isn't the question. Didn't you make a critical examination in May and June, 1953?

A. I would read the thing over just the same way. I wouldn't call it "critical."

Q. And wasn't it in May, 1953, or June, 1953, that you determined for the first time that by interpretation of the ASTM A-17/29 specifications, that sand cast billets without subsequent rolling or forging would not comply?

A. When I first received the order from Mr. Gips—— [1095]

Mr. Morrow (Interposing): Pardon me for interrupting. May the witness have the question back? I didn't mean to interrupt you, Mr. Clark, but the way you started out, I don't think you were going

(Testimony of William Wallace Clark.)

to answer the question. I am sorry, sir, Mr. Clark.

The Witness: That is all right.

Mr. Morrow: May the question be read?

The Court: The reporter will read the question.

(Whereupon, the following was read by the reporter: "Q. And wasn't it in May, 1953, or June, 1953, that you determined for the first time that by interpretation of the ASTM A-17/29 specifications, that sand cast billets without subsequent rolling or forging would not comply?"")

A. (Continuing): That was not the first time. The first time I determined that was in my first conversation with Mr. Gips.

Q. (By Mr. Morrow): Very well. However, you did advise Mr. Robinson, didn't you, that in respect to this particular order, inasmuch as it had been placed with the Foundry, it had to be assumed that cast billets that conformed to the specifications as to size, surface conditions, and [1096] chemical analysis were acceptable?

Mr. Gantt: Objection. He already answered that question once or twice. Repetition.

Mr. Morrow: The purpose of this——

The Court (Interposing): I will overrule the objection.

Mr. Morrow: May the reporter read the question?

The Court: The reporter will read the question.

(Testimony of William Wallace Clark.)

(Whereupon, the following was read by the reporter: "Q. Very well. However, you did advise Mr. Robinson, didn't you, that in respect to this particular order, inasmuch as it had been placed with the Foundry, it had to be assumed that cast billets that conformed to the specifications as to size, surface conditions, and chemical analysis were acceptable?")

A. I wouldn't advise him exactly that. I would advise him I had told Mr. Gips that the only instance—that the only paragraphs—inspection we could make was for chemical, surface conditions, and size.

Q. (By Mr. Morrow): Well, let me ask [1097] you:

Is this information—information which you furnished Mr. Robinson—contained in Plaintiff's Exhibit 49:

"In this particular case since the order had been placed with a foundry which had no facilities for rolling or forging it had to be assumed that cast steel billets conforming to specifications as to size, surface conditions and chemical analysis were acceptable."

A. Acceptable to A-17, with the modification as outlined in my original talk.

Mr. Morrow: Would you read the question back?

Mr. Clark, if you will, just listen to the first part of the question, sir. I think you will understand it.

(Testimony of William Wallace Clark.)

(Whereupon, the following was read by the reporter:) “Q. Well, let me ask you: Is this information—information which you furnished Mr. Robinson—contained in Plaintiff’s Exhibit 49:

“ ‘In this particular case since the order had been placed with a foundry which had no facilities for rolling or forging it had to [1098] be assumed that cast steel billets conforming to specifications as to size, surface conditions and chemical analysis were acceptable’?”

Mr. Gantt: I believe the witness already answered that, your Honor.

Q. (By Mr. Morrow): Can you answer that, Mr. Clark?

The Court: If he has, he may answer it again.

A. It wasn’t the case of assumption. It was a fact that they had ordered that, and that is what they got.

Q. (By Mr. Morrow): I am sorry I have not made it clear.

A. You made it clear, but——

Q. (Interposing): The question is: Was this information that you furnished Mr. Robinson?

A. I don’t remember furnishing that information. We have talked it over, I will grant you that; but what I furnished him, I do not remember.

Q. Now——

Mr. Gantt (Interposing): I object, your Honor, to this whole line of questioning, on the ground the

(Testimony of William Wallace Clark.)

witness said he didn't remember this, and I [1099] object, irrelevant and immaterial, matter occurring after the claim, in some conversation which the witness says he does not recall having with Mr. Clark, and I move the whole line of questions and answers be stricken.

The Court: The motion may show, and the motion will be denied.

You may proceed.

Q. (By Mr. Morrow, continuing): Mr. Clark, I gathered you may have furnished Mr. Robinson that particular information, but you don't recall it.

Now, can you state what time you furnished information to Mr. Robinson concerning this matter under discussion?

Was it back on May 16, 1952, or was it in May, 1953?

A. I gave Mr. Robinson my notes on May 16, 1952, and talked over the order with him.

Q. Yes; and you said that you made complete notes of important matters at that time, didn't you?

A. Which I considered important, yes.

Q. Well, now, so, therefore, May I conclude that inasmuch as you didn't include this information, and I am referring to the following:

"By strict interpretation of ASTM [1100] specification A-17/29 cast billets without subsequent rolling or forging would not comply. However, for the past several years during which a serious steel shortage has existed, it has been quite common to accept cast billets which otherwise conformed to



(Testimony of William Wallace Clark.)

the specification. In this particular case since the order had been placed with a foundry which had no facilities for rolling or forging, it had to be assumed that cast billets conforming to specifications as to size, surface condition and chemical analysis were acceptable."

Now, my question is this:

Inasmuch as that information was not contained in your original notes of May 16, 1952, isn't it fair to assume that this was the information which you developed in May, 1953, when the New Zealand claim arose?

A. I do not see the connection.

Mr. Morrow: That is all.

Mr. Gantt: Just a couple of questions, [1101]  
Mr. Clark.

Redirect Examination

By Mr. Gantt:

Q. What makes a steel billet a billet of forging quality, or a forging quality billet?

A. Chemical analysis only.

Q. Did you hear Mr. Murphy's—Mr. Murphy testify as to how the procedures and practices and manner in which these particular cast billets in this case were manufactured by the Foundry?

A. I did.

Q. Speak up a little louder, please.

A. I did.

Q. Will you state whether the castings which

(Testimony of William Wallace Clark.)

Mr. Murphy has described as having made were of forging quality?

A. They were forging quality.

Q. Was that based upon your years of experience in the iron and steel business?

A. Yes, sir.

Q. What qualifications or training does an inspector who works in your company require?

A. The qualifications of the inspectors required in our company—they are qualified to inspect as per instructions for defects or for variations with original instructions. [1102]

Q. Do they have to be engineers, metallurgists or chemists?

A. No, we get the most of them from industry.

Q. Do they even have to be college graduates?

A. No, sir.

Q. Do you give them a course of training?

A. We give them a course of training in their duties.

Q. Then they don't have to be experts in each field?      A. No.

Q. Let me show you, Mr. Clark, Exhibit——

Mr. Morrow (Interposing): Objected to as improper redirect.

The Court: I don't know what the question is.

Mr. Gantt: I was trying to get the number of the exhibit.

Q. (By Mr. Gantt, continuing): For illustrative purposes, only, Mr. Clark, I would like to show you Plaintiff's Exhibit 69, and ask if you will state,

(Testimony of William Wallace Clark.)

looking at page 138 in the book, "The Making and Shaping of Steel," by United States Steel Company, and look at this picture in the center of the page, being 138 and 139, and tell me [1103] what is that item sitting on the rolls there?

Mr. Morrow: Objected to as improper redirect. It wasn't gone into on cross.

The Court: It may be, although if counsel wishes to reopen for that purpose, I will permit it.

Mr. Morrow: I really have no objection.

Mr. Gantt: I would just like to have the witness look at the picture and tell us if he knows what that item is on the rolls there.

A. It is definitely a wide flange beam.

Q. (By Mr. Gantt): Is it a steel billet?

A. No.

Q. Will you turn for a moment to page 130?

The Court: What was the first page?

Mr. Gantt: The first page was 138 and page 139. It is a picture which appears in the center of the two pages, which was previously testified to by Mr. Hargos as being a billet.

Q. (By Mr. Gantt, continuing): Will you examine pages 130 and 131 of Exhibit 69, and look at the picture on the left-hand side of the page, which is page 130, and tell us what is depicted there?

A. That is an ingot coming out of the [1104] soaking pit.

Q. An ingot?           A. Yes.

Q. Can you estimate the size of it with respect

(Testimony of William Wallace Clark.)

to the man pictured there, and the other items there with which you are familiar?

A. If it is completely out and in comparison with the man I would say possibly twenty tons.

Q. Twenty tons. Now, how much of a job would it be to crop or discard or cross-section that ingot?

A. It would be more than the steel was worth.

Q. Was it very difficult?

A. A very difficult job.

Q. And take considerable time? A. Yes.

Q. Now, in your cross-examination Mr. Morrow made reference to a question and answer appearing on page 49 of your deposition. He asked you if you made answer—if you were asked the question appearing on line 29.

Mr. Gantt: May we have the deposition, your Honor?

(Whereupon, document was handed to counsel by the Clerk.) [1105]

Q. (By Mr. Gantt, continuing): You were asked by Mr. Morrow on cross-examination, and will you turn to page 49 of your deposition taken in San Francisco, August 12, 1954, and I believe that Mr. Morrow on cross-examination asked you the question beginning on line 20, and you stated that you answered—you were asked that question, and you gave the answer which appears on that page; is that correct? A. I gave it.

Q. Now, I will ask you, sir, if you were asked the question appearing on line 16, or line 11:

(Testimony of William Wallace Clark.)

“Were you the one who made the assumption that cast billets would be acceptable under those circumstances?”

Were you asked that question?

Mr. Morrow: Objection. Now, I don't think this is proper, your Honor. This has nothing to do with the question involved.

Mr. Gantt: The question was gone into. Are you finished, counsel? [1106]

\* \* \*

The Court: It may have some bearing. I think this whole question and answer may be brought out, yes; anything related to the question asked.

Mr. Gantt: I believe that it is related, your Honor.

Q. (By Mr. Gantt, continuing): All right. I will ask you to examine page 49 of your deposition, at line 11, and will ask you if you were asked, in your deposition, the question beginning:

“Were you the one who made the assumption that cast billets would be acceptable under those circumstances?”

Were you asked that question? A. Yes, sir.

Q. And did you give the answer on line 13, page 49:

“No, sir. I told Mr. Gips that they could [1107] not make them, so that the only thing we could inspect would be chemical, size and surface defects.”

Did you make that answer?

A. I made that answer.

(Testimony of William Wallace Clark.)

Q. Were you asked the following question, line 16:

“Did you ask him what the steel billets were for?”

Were you asked that question on your deposition?

A. I answered:

“No, sir, it wasn’t my business.”

Q. And does that appear in your deposition?

A. Yes, sir.

Mr. Gantt: That is all the redirect examination.

### Recross-Examination

By Mr. Morrow:

Q. Well, did you make the following answers to the following questions:

“That isn’t your business?”

Answer: “No, that is the customer’s.”

A. That is written here, yes, sir.

Q. And, on the next page, weren’t the [1108] following questions and answers put to you at that time—to make the examination complete:

“Q. Yes. Now, in the inspection business, Mr. Clark, is it important for an inspector to know, who is inspecting steel and certifying them to conform to ASTM specifications, to know what use is going to be made of the steel in order that he may make a proper inspection?

“A. Yes, but it would be 20 per cent of the time that we know what the end use is.”

A. That is correct; that is what I said.

(Testimony of William Wallace Clark.)

Q. Mr. Clark, you testified, I think, on redirect here, that in your opinion the billets supplied by the Foundry were in conformance with the specifications you had.

My only question is: You made no examination personally of the billets, did you?

A. Of the billets?

Q. Yes.

A. I was in San Francisco, and the billets were in Seattle.

Q. You can't say whether they complied or didn't comply?

A. No, as far as surface and chemical—that is all. [1109]

As far as I know, nothing except from the reports.

Q. All you saw was the chemical analysis?

A. All I saw was the chemical analysis.

Mr. Morrow: That is all.

Mr. Savage: Seattle Foundry has no further questions.

The Court: That is all, Mr. Clark.

Mr. Gantt: May he be excused, your Honor?

Mr. Morrow: Yes.

Mr. Savage: As far as we are concerned.

Mr. Morrow: Thank you, Mr. Clark.

The Court: You may be excused, Mr. Clark. You are excused from attendance under subpoena as far as this case is concerned. He may remain or go back to San Francisco, as he chooses. [1110]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT, TO RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designation of counsel, I am transmitting herewith the following original papers in the file dealing with the action as the record on appeal to the United States Court of Appeals at San Francisco, said papers being identified as follows:

1. Complaint, filed June 8, 1954.
14. Answer of Pittsburgh Testing Laboratory, filed Aug. 2, 1954.
108. Pretrial order, filed Nov. 29, 1955.
116. Memorandum decision, filed May 17, 1956.
117. Plaintiff's Motion for Rehearing and Clarification of Memorandum decision, filed Aug. 31, 1956.
120. Order Denying Plaintiff's Motion for Rehearing and Clarification of Memorandum Decision, filed Sept. 17, 1956.
121. Findings of Fact and Conclusions of Law, filed Sept. 21, 1956.
122. Judgment, filed Sept. 21, 1956.



124. Notice of Appeal, filed Oct. 18, 1956.

125. Cost Bond on Appeal, filed Oct. 18, 1956.

126. Order Extending Time for Filing Record and Docketing Appeal, filed Nov. 17, 1956.

127. Statement of Points Upon Which Appellant Will Rely, filed 12-31-56.

128. Designation of Contents of Record on Appeal, filed 12-31-56.

129a, b, c, d, e. Five Volumes of Court Reporter's Transcript of Trial Proceedings, filed Dec. 31, 1956.

130. Order Transmitting Original Exhibits, filed Dec. 31, 1956.

131. Volume 6 of Court Reporter's Transcript of Trial Proceedings, filed Jan. 2, 1957.

132. Volume 7 of Court Reporter's Transcript of Trial Proceedings, filed Jan. 4, 1957.

Plaintiff's Exhibits 1 to 25, inclusive; 26 to 50, inclusive; 51 to 71, inclusive.

Defendant's Exhibits A-1 to A-25, inclusive; A-26 to A-28, inclusive; A-29 (same as Plaintiff's Exhibit 54); A-30 (same as Plaintiff's Exhibit 55); A-31 to A-34, inclusive, and Defendants' Exhibit B-1.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellant for preparation of the record on appeal in

this cause, to wit: Filing fee, notice of appeal, \$5.00; and that said amount has been paid to me on behalf of the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 4th day of January, 1957.

[Seal]                      MILLARD P. THOMAS,  
Clerk;

By /s/ TRUMAN EGGER,  
Chief Deputy.

---

[Endorsed]: No. 15408. United States Court of Appeals for the Ninth Circuit. Grace & Co. (Pacific Coast), Appellant, vs. Pittsburgh Testing Laboratory, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 11, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

No. 15408

---

**United States Court of Appeals**  
**For the Ninth Circuit**

---

GRACE & Co. (Pacific Coast), a corporation, *Appellant*,  
vs.

PITTSBURGH TESTING LABORATORY, a corporation,  
*Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION  
HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

---

**APPELLEE'S BRIEF**

---

GRAHAM, GREEN & DUNN,  
BEN J. GANTT, JR.,  
FRANK T. ROSENQUIST,  
*Attorneys for Appellee.*

625 Henry Building,  
Seattle 1, Washington.

---

THE ARGUS PRESS, SEATTLE

FILE

MAY 22 1957



**United States Court of Appeals**  
**For the Ninth Circuit**

---

GRACE & Co. (Pacific Coast), a corporation, *Appellant*,  
vs.

PITTSBURGH TESTING LABORATORY, a corporation,  
*Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION  
HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

---

**APPELLEE'S BRIEF**

---

GRAHAM, GREEN & DUNN,  
BEN J. GANTT, JR.,  
FRANK T. ROSENQUIST,  
*Attorneys for Appellee.*

625 Henry Building,  
Seattle 1, Washington.



## SUBJECT INDEX

	<i>Page</i>
Jurisdiction .....	1
Statement of the Case.....	2
Summary of Argument.....	11
Argument .....	11
I. Appellant's Authorities and Argument.....	11
Evidence as to Contemplation of Parties Ad- missible on Issue of Damages.....	13
Appellant's Cases and Authorities on Dam- ages .....	20
II. Appellant's Claimed Damage Not Caused by Appellee's Failure to Inspect.....	22
III. Appellant's Alleged Damage for Failure to Supply Rolled or Forged Billets to New Zea- land Was Not Within the Contemplation of Both the Parties When Inspection Contract Made .....	29
Conclusion .....	37
Appendix, Exhibit 9.....	39
Appendix, Exhibit 23.....	40
Appendix, Exhibit 24.....	41
Appendix, Exhibit A-1 .....	42

## TABLE OF AUTHORITIES CITED

### Cases

<i>Asbury v. Yakima Milling Co.</i> , (1926) 137 Wash. 203, 242 Pac. 362.....	13
<i>Dally v. Isaacson</i> , (1952) 40 Wn.(2d) 574, 245 P. (2d) 200 .....	20
<i>First Nat. Bank of Mandan v. Larsson</i> , (1937) 67 N.D. 243, 271 N.W. 289.....	28
<i>Gagne v. Bertran</i> , (1954) 43 Cal.(2d) 481, 275 P. (2d) 15 .....	26
<i>Globe Refining Co. v. Landa Cotton Oil Co.</i> , (1903) 190 U.S. 540, 23 S.Ct. 754, 47 L.ed. 1171.....	16, 34
<i>Goddard v. Metropolitan Trust Co. of California</i> , (C.C.A. 9, 1936) 82 F.(2d) 902.....	28

	<i>Page</i>
<i>Hadley v. Baxendale</i> , (1854) 9 Exch. 341, 156 Eng. Rep. 145 .....	21, 34, 35, 36
<i>Hanson &amp; Parker v. Wittenburg</i> , (1910) 205 Mass. 319, 91 N.E. 383.....	16
<i>Hopkins v. Barlin</i> , (1948) 31 Wn.(2d) 260, 196 P. (2d) 347 .....	13
<i>Martinac v. Bakovic</i> , (1930) 158 Wash. 193, 290 Pac. 847 .....	20
<i>Messmore v. New York Shot &amp; Lead Co.</i> , 40 N.Y. 422	15
<i>Platts v. Arney</i> , (1957) 150 Wash. Dec. 33, 309 P. (2d) 372 .....	23
<i>Sedro Veneer Co. v. Kwapil</i> , (1911) 62 Wash. 385, 113 Pac. 1100.....	20
<i>Shannon v. Prall</i> , (1921) 115 Wash. 106, 196 Pac. 635 .....	13
<i>United States v. United States Gypsum Co.</i> , (1948) 333 U.S. 364, 68 S.Ct. 525, 92 L.ed. 746.....	12
<i>United States v. Yellow Cab Co.</i> , (1949) 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150.....	12
<i>West v. Conrad</i> , (C.C.A. 9, 1950) 182 F.(2d) 255.....	12
<i>Weston v. Boston &amp; Maine R. R. Co.</i> , (1906) 190 Mass. 298, 76 N.E. 1050.....	16
<i>Young v. Yeates</i> , (1922) 153 Minn. 366, 190 N.W. 791 .....	27

### Statutes and Rules

Title 28 U.S.C. Sec. 1291.....	2
Title 28 U.S.C. Sec. 1332.....	1
Rule 52(a), Federal Rules of Civil Procedure.....	12

### Textbooks

McCormick, <i>Damages</i> , (1935) pp. 564, 565.....	35
McCormick, <i>Damages</i> , (1935) p. 566.....	34
McCormick, <i>Damages</i> , (1935) pp. 567, 568.....	36
1 Sutherland, <i>Damages</i> , (4th ed.) Sec. 45, p. 170....	23, 34
1 Sutherland, <i>Damages</i> , (4th ed.) Sec. 50.....	20, 21, 34
1 Sutherland, <i>Damages</i> , (4th ed.) Sec. 51.....	15



## TABLE OF AUTHORITIES

v

*Page***Miscellaneous**

American Law Institute, <i>Restatement, Contracts</i> , (1932) Sec. 330.....	34
McCormick, <i>The Contemplation Rule as a Limita- tion Upon Damages for Breach of Contract</i> , 19 Minn. L. Rev. 497, 507.....	15



# United States Court of Appeals

## For the Ninth Circuit

GRACE & Co. (Pacific Coast), a corporation,

*Appellant,*

vs.

PITTSBURGH TESTING LABORATORY, a corporation,

*Appellee.*

No. 15408

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

### APPELLEE'S BRIEF

#### JURISDICTION

This is a civil action in contract for damages in excess of \$3,000, exclusive of interest and costs, which was filed in the United States District Court for the Western District of Washington June 8, 1954 (R. 9) by appellant, Grace & Co. (Pacific Coast), a West Virginia corporation, against appellee, Pittsburgh Testing Laboratory, a Pennsylvania corporation (Complaint R. 3-9; Pre-Trial Order R. 18-19). The nature of the action, diversity of citizenship and the amount in controversy gives the District Court jurisdiction by virtue of Title 28, U.S.C. Sec. 1332. Following trial of the case and on September 21, 1956, judgment was entered (R. 105) from which an appeal was taken on October 18, 1956 (R. 105, 106), and duly filed in this court on Janu-

ary 11, 1957 (R. 546). This court has jurisdiction of the appeal by virtue of Title 28, U.S.C. Sec. 1291.

### STATEMENT OF THE CASE

The appellant, Grace & Co., brought suit against the appellee, Pittsburgh Testing Laboratory, to recover claimed damages in the sum of \$21,747.24 for an alleged breach of contract between the parties wherein the appellee agreed to inspect certain steel billets ordered by the appellant from the Seattle Foundry Co., Inc.

The appellant was and is engaged in the operation of a large export and import business and maintains offices throughout the United States, including, among others, Washington, D.C., San Francisco, California and Seattle, Washington (R. 82). The appellant's Seattle office, in response to a request from appellant's San Francisco office, mailed letters on April 23, 1952, to various companies in Seattle requesting offers on steel billets, specifications ASTM A-17/29 (R. 235, Ex. 3). The letters of inquiry were sent out in an effort to fill a proposed order for steel billets ASTM A-17/29 from the New Zealand Government Trade Commissioner (R. 118, Ex. 1). In late April or early May, 1952, Mr. William H. Schlauch (whose name is improperly spelled "Schlaugh" in the Record) of appellant's Seattle office had telephone conversations with several of the prospective suppliers, including one with Seattle Foundry Co., Inc., hereinafter referred to as "Seattle Foundry," in which Schlauch was advised that Seattle Foundry could furnish sand cast billets (R. 274, 275, Ex. 54 p. 55). On April 30th, Mr. Schlauch was advised by Sei-

delhuber Steel Rolling Mill Corporation, one of the suppliers to whom appellant had made inquiry, that Seidelhuber could only furnish "forging quality ingots" which would have the quality of steel billets; Seidelhuber further inquired of Mr. Schlauch whether quality forging ingots would be satisfactory (R. 270, Ex. 5, A-4). Mr. Schlauch, on May 1st, advised Mr. C. G. Gips, who was handling the transaction for appellant's San Francisco office, that Isaacson Iron Works had submitted a written proposal to supply steel billets to meet specifications ASTM A-17/29 (Ex. 5 and 6). Pacific Car & Foundry Company notified Mr. Schlauch on May 2nd that the particular ASTM specification was obsolete and the subject of "rolled or cast ingots" was discussed (R. 272, 273, Ex. 54 p. 55). After the receipt of a quotation on the order from Seattle Foundry (Ex. 7), Mr. Schlauch, on May 5th, had a telephone conversation with Mr. James Murphy, the manager of Seattle Foundry, in which Murphy advised Schlauch that the billets which Foundry would supply to meet the order were "cast steel billets from sand molds" (R. 276, 277). During this conversation, Schlauch made a pencilled notation on Seattle Foundry's letter to appellant dated May 2, 1952, as follows: "Cast steel from sand molds" (R. 279, Ex. 7). This notation is still legible on Exhibit 7, even though Mr. Schlauch attempted to erase it after the New Zealand Government made a claim against appellant (R. 280, 282, 283).

Upon receipt of Isaacson Iron Works' written proposal, Mr. Gips, on May 6th, advised appellant's Washington, D.C., office that Isaacson had offered to supply the billets (Ex. 8). Thereafter, appellant executed a

purchase order with the New Zealand Government Trade Commissioner based on the prices quoted by Isaacson (R. 120, Ex. 11).

On May 8, 1952, Schlauch wrote Gips that Seattle Foundry had offered to supply the billets at a much lower price per ton than Isaacson Iron Works and stated "These billets are cast steel from sand molds . . ." (Ex. 9, Appendix 39). Upon receiving this information, Mr. Gips wrote and teletyped Schlauch and expressed great concern over the substantial difference in price between the quotations of Isaacson and Seattle Foundry and instructed Schlauch to recheck all "figures, specifications and grades" (Ex. 10, 12). Thereafter, on May 12th Mr. Schlauch called Mr. Murphy at Seattle Foundry and was advised that Seattle Foundry had made an error in its price quotation on Item 2 and, accordingly Foundry *reduced* its offer to supply Item 2 from \$175.00 per ton to \$130.00 per ton (R. 241). In this conversation, Mr. Murphy discussed the chemical requirements of ASTM A-17/29 specifications with Mr. Schlauch in some detail (R. 240, 241, Ex. 54 p. 58). Later in the day on May 12th, Mr. Schlauch called Isaacson Iron Works, who informed him that the billets produced by Isaacson would be "roll(ed) to size" (R. 288, Ex. 54 p. 59). In this conversation Schlauch made no attempt to ascertain from Isaacson why there should be such a large differential in the prices quoted by Isaacson and those quoted by Seattle Foundry (R. 288). Indeed, neither Gips nor Schlauch made any attempt to account for the great price discrepancy (R. 196, 199, 207).

Upon being assured by Schlauch that Seattle

Foundry's price had been rechecked (Ex. 13), Mr. Gips, on May 15th, called Schlauch and instructed him to accept Seattle Foundry's offer to manufacture the billets (R. 142, 291). Mr. Schlauch, thereupon, on May 15th, orally ordered the billets from Seattle Foundry (R. 291, 292). Thereafter, on May 16th, appellant's Seattle office sent a letter to Seattle Foundry which purported to be a written contract to supply the billets (Ex. 20). In spite of the fact that specifications ASTM A-17/29 called for the billets to be of rolled or forged steel rather than simply cast steel (R. 25), Seattle Foundry wrote appellant on May 16th stating in part, "It is our intention to pour these billets in sand molds . . . ." (Ex. 23, Appendix 40). The reference to "pour in sand molds" obviously meant that the Seattle Foundry, which had no facilities for rolling or forging steel, intended from the outset to supply cast steel billets (R. 484). This fact was accepted by appellant who answered Seattle Foundry's letter of May 23rd advising Seattle Foundry, "we have no objection to your pouring both sides flat" (Ex. 26).

Appellant placed its order for the billets with Seattle Foundry rather than Isaacson Iron Works because Seattle Foundry's prices were considerably lower than Isaacson's quotations (R. 132, 133, 190, 195). Appellant paid Seattle Foundry \$27,119.16 for the billets (R. 99). Isaacson's price, based on its quotations to appellant, would have been \$36,310.00 (R. 337, 338). In fact, Seattle Foundry's price would have meant at least \$6,000 to \$8,000 additional profit to appellant since their agreement with the New Zealand government was based upon Isaacson's quotations (R. 191, 192). Ap-

pellant was well aware of the danger in placing the business with an unknown supplier such as Seattle Foundry where there was such an unusually large price differential. Long before the billets were finally shipped the appellant's San Francisco office cautioned appellant's Seattle office about the unusual price spread (Ex. A-15). After the difficulty arose, Mr. George Mahoney, appellant's vice-president in charge of its San Francisco office, reminded the Seattle office of the fact that the "bargain purchase that your office has made has boomeranged . . ." (Ex. A-12). At the same time, however, the appellant's Seattle office was vitally interested in receiving credit for the unusual profit resulting from placing the order with Seattle Foundry (R. 298, Ex. 24, Appendix 41).

Although Mr. Gips had made a preliminary telephone inquiry as to whether appellee had facilities to inspect the billets to be produced by Seattle Foundry, appellant, at the time of this telephone inquiry, had completed all of its arrangements with Seattle Foundry to produce billets for its purchase order with the New Zealand Government (R. 145). On May 15th or 16th Mr. Gips called Mr. W. W. Clark of appellee's San Francisco office and inquired as to whether appellee had an office in Seattle and could inspect billets produced by Seattle Foundry to be shipped to New Zealand (R. 464). Mr. Gips advised Mr. Clark that appellant had ordered 800 steel billets to be produced by Seattle Foundry under specification ASTM A-17/29. In a subsequent conversation with Mr. Gips a short time later, Mr. Clark advised Gips that the Seattle Foundry



had no facilities for rolling or forging billets as called for by ASTM A-17/29 (R. 76, 77, 465, 466, Ex. A-1, Appendix 42). Mr. Gips, at the time of this telephone conversation, had before him Schlauch's letter of May 8th (Ex. 9, Appendix 39) stating that the billets produced by Seattle Foundry would be "cast steel from sand molds" (R. 207, 212). In any event, in a telephone conversation on either May 15th or 16th, 1952, Mr. Clark orally agreed that appellee would inspect the product which was to be produced by Seattle Foundry (R. 143). Although the appellee was advised that the billets were for shipment to New Zealand, the appellee was not advised that the New Zealand Government intended to use the billets for railroad locomotive parts until after the claim arose (R. 92, 399, 474). At this time appellee had no knowledge of either the contents of the New Zealand Government's purchase order or of appellant's purported written contract with Seattle Foundry (R. 399, 407, 474, 479). At this time each of the parties assumed that the billets to be produced by Seattle Foundry and to be inspected by appellee were cast steel billets (R. 76, 95).

Mr. Clark made pencilled notes of his telephone conversation with Gips on May 16th (R. 467, Ex. A-1, Appendix 42). After discussing his conversation with Mr. Gips with his superior, Mr. Parker M. Robinson, manager of appellee's San Francisco office, Clark called appellee's Seattle office on May 16th to inform them of the pending inspection job (R. 468). Thereafter, on May 17th, Clark wrote appellee's Seattle office advising of appellant's order to appellee to inspect cast steel billets and set forth in detail the method of sampling

and inspection to be followed by the appellee's Seattle office (R. 468, 469, Ex. A-3).

On May 20, 1952, Mr. Gips wrote appellee's San Francisco office confirming the oral agreement to inspect the billets ordered by appellant from Seattle Foundry (Ex. 21, Appendix A to Appellant's Brief). Upon receipt of this letter, appellee's San Francisco office replied and agreed to inspect the billets (Ex. 22, Appendix B to Appellant's Brief).

Production of the billets was commenced by Seattle Foundry in early June and completed September 3, 1952. Periodically during the course of the inspection of the billets produced by Seattle Foundry, appellee furnished appellant 43 reports of its inspection (Ex. 35, A-31). In practically all of these reports, appellee advised appellant that it had observed and inspected the "casting" of the billets produced by Seattle Foundry. At no time during the production of the billets or upon receipt of the reports from appellee did appellant question the reports or the use of the terms "cast" or "casting" therein. While appellee's reports of its inspection were furnished to appellant's San Francisco office, appellant admittedly did not read all of these reports and Mr. Gips testified, "it doesn't make much sense to me" (R. 221). Although in its purported contract of May 16th with Foundry (Ex. 20, Appendix C to Appellant's Brief), appellant requested Seattle Foundry to furnish plant certificates certifying that the billets met the specifications ASTM A-17/29, Seattle Foundry did not furnish said plant certificates (R. 300).

On May 15, 1953, the New Zealand Government wrote appellant advising them that the steel billets supplied did not meet the specifications of ASTM A-17/29 in that they were of cast steel rather than rolled or forged (Ex. 42). Thereafter, appellant voluntarily refunded the New Zealand Government \$21,747.24 of the total price of \$37,462.64 paid by New Zealand for the billets (R. 100). This suit was instituted by appellant against appellee to recover the amount so refunded by appellant to New Zealand.

After having heard the testimony and the evidence on the merits, the trial court awarded judgment in favor of the appellant against the appellee in the sum of \$3,151.84, being the amount which appellant paid appellee for its inspection services. The trial court concluded that the exchange of letters between appellant and appellee dated May 20 and 21, 1952 (Exs. 21, 22) constituted a written integrated contract. The trial court concluded that appellee breached the contract by failing to inspect billets in compliance with the specifications set forth in the written contract and in failing to give a certification as required by the terms of the contract (R. 96). The court found that the agreement between appellant and appellee called for the inspection of billets that were ordered from and to be produced by Seattle Foundry (R. 54, 55); that the employees of appellant who handled the transactions with appellee and Seattle Foundry had information and knowledge that the billets to be produced by Seattle Foundry were "cast steel from sand molds" and "cast steel billets" (R. 95). In its written decision, the court pointed out that the inspection services of appellee

were sought by Gips after appellant had decided to purchase the billets from Seattle Foundry; that the written contract between appellant and appellee was negotiated following the contract between appellant and Seattle Foundry (R. 65). The trial court found as a fact that the services of appellee were not sought to guide or advise appellant in placing their order or awarding their contract for the purchase of the billets (R. 65, 66).

As to the measure of damages, the court found that the damages of \$21,747.24 sought by appellant (apart from the compensation paid appellee of \$3,151.86) were the natural and proximate consequences of the breach of contract by *Seattle Foundry*, if such contract called for forged or rolled billets rather than cast steel billets, or in the event said contract did not so provide, the natural and proximate consequences of *appellant's* own *failure* to purchase billets that did meet the specifications of their contract with New Zealand (R. 66). The court held that the only damages suffered by appellant as a direct and proximate result of appellee's breach of its contract with appellant was the sum of \$3,151.86; and that such damages were the only damages which were within the contemplation of the parties at the time the contract was entered into as a likely consequence of the nonperformance of appellee's contract to inspect billets produced by Seattle Foundry (R. 101). Judgment was entered in favor of appellant against appellee September 21, 1956, in the sum of \$3,151.86 together with interest thereon at the rate of 6% per annum from August 26, 1954 (R. 103-105). The appellant now appeals from this judgment contending

that the trial court erred in admitting and considering certain evidence in determination of appellant's damages and that the court committed error in not awarding appellant the sum of \$21,747.24 in damages against the appellee.

## **SUMMARY OF ARGUMENT**

The trial court found that the only damages suffered by appellant which were caused by appellee's breach of contract were the sum of \$3,151.86 being the amount paid by appellant to appellee. Appellant attacks the trial court's finding claiming that appellee's breach caused appellant to suffer damages in the sum of \$21,747.24. We hereafter discuss under part I, appellant's argument and authorities. We then consider, under part II, that the alleged damages of \$21,747.24 claimed by appellant were not proximately caused by appellee's failure to inspect the billets produced by Seattle Foundry. Under part III, we consider that appellant's alleged damages for failure to supply rolled or forged billets to New Zealand were not within the contemplation of both parties at the time when the contract for appellee's services was made. Accordingly, the judgment of the trial court should be affirmed.

## **ARGUMENT**

### **I.**

#### **APPELLANT'S ARGUMENT AND AUTHORITIES**

While appellant sets forth six specifications of error on pages 10 to 12, inclusive, of its brief, these may be conveniently grouped in three categories as follows: (1) error in admitting and considering certain evidence as to what damages were within the contemplation of

the parties; (2) error in finding that appellee's inspection services were not sought by appellant prior to the time appellant entered into a formal contract with Seattle Foundry; and (3) error in finding that the only damage suffered by appellant as a direct and proximate consequence of the breach by appellee of its contract with appellant was the sum of \$3,151.86.

Before discussing appellant's argument and authorities, it is appropriate to point out the weight which must be given to the trial court's findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure governs this point, stating in part:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In *United States v. Yellow Cab Co.*, (1949) 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150, the Supreme Court discussed the “clearly erroneous” doctrine of Rule 52(a) at page 342, as follows:

“While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not ‘clearly erroneous.’ ”

To the same effect see: *United States v. United States Gypsum Co.*, (1948) 333 U.S. 364, 68 S.Ct. 525, 92 L.ed. 746, and *West v. Conrad*, (C.C.A. 9, 1950) 182 F.(2d) 255.

In the present case, the trial court, in addition to making detailed Findings of Fact (R. 81-101, inclusive) also incorporated in his findings "any additional facts found by the court in its written memorandum decision . . . to supplement the findings of fact" (Finding of Fact XXIII, R. 101). Accordingly, the doctrine of Rule 52(a) applies equally to facts found in the memorandum decision (R. 42-80).

### **Evidence as to Contemplation of Parties Admissible on Issue of Damages**

Appellant contends that the trial court erred in admitting and considering certain evidence in determining the amount of appellant's damages, if any, caused by appellee. Specifically, it is urged on page 18 of appellant's brief that the court erred in admitting evidence of appellee's understanding that the billets ordered and to be produced were *cast* steel billets instead of billets that had been subsequently rolled or forged. In support of this Specification of Error appellant cites cases and authorities with respect to the parol evidence rule which, of course, applies only to the formation of a contract, not to evidence admitted in connection with damages.

The Washington cases cited by appellant in support of this rule of limited application are *Asbury v. Yakima Milling Co.*, (1926) 137 Wash. 203, 242 Pac. 362; *Shannon v. Prall*, (1921) 115 Wash. 106, 196 Pac. 635; and *Hopkins v. Barlin*, (1948) 31 Wn.(2d) 260, 196 P.(2d) 347. None of these cases deal in any way with the admission or exclusion of parol or extrinsic evidence introduced for the purpose of assessing or determining

the amount of damages sustained by plaintiff as a natural consequence of a breach of contract by defendant. None of the cited cases present the question as to what type of relevant evidence is admissible upon this issue. In such case, all relevant evidence bearing upon this issue is admissible, written, oral or otherwise, and such relevant evidence does not fall within the ban of the so-called parol evidence rule because it is not admitted, for the purpose of varying or contradicting the terms of an integrated contract; rather, it is admitted for the purpose of determining the amount of damages, if any, sustained by one party by reason of a breach of such integrated contract by the other party. The evidence is not "parol evidence" as such term is used in connection with the parol evidence rule. In short, the parol evidence rule is a rule of limited application; it does not serve to exclude evidence, oral or otherwise, relevant to the issue of recoverable damages.

The trial court held that appellant and appellee had a written integrated contract consisting of an exchange of letters dated May 20 and May 21, 1952 (R. 88, Exs. 21 and 22). The court also found that this contract required appellee to inspect steel billets to be produced by Seattle Foundry in compliance with specifications ASTM A-17/29 and to give appellant its certification with respect to such inspection (R. 61, 62). Appellant's objection to the admission and consideration of testimony to the effect that appellee understood that such billets were to be *cast* steel billets appears to be based upon the premise that such understanding was that of Mr. Clark, appellee's agent, alone. In fact, this understanding was *mutually* shared by both Mr. Clark and



appellant's agent, Mr. Gips, and the court so found (R. 75, 76, 77, 95). Since this was evidence relevant to the issue of what damages could reasonably have been anticipated by or were within the contemplation of both parties at the time of the contract, it did not fall within the ban of the parol evidence rule. In passing on this point, the lower court stated in its written memorandum decision (R. 76) as follows:

“This evidence, while inadmissible to vary the terms of the written contract, is admissible and relevant to the issue of what was within the contemplation of the parties, with respect to the special damages now being claimed, at the time the contract was entered into. *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*; *Messmore v. New York Shot & Lead Co.*, 40 N.Y. 422; Sutherland on Damages (4th ed.) Sec. 51.”

Section 51 of 1 Sutherland, *Damages*, cited by the trial court (discussing *Messmore v. New York Shot & Lead Co.*, 40 N.Y. 422) states as follows:

“The contract between these parties was in writing but did not contain any allusion to the special object of making it. It was held, notwithstanding, that it was competent to prove such antecedent contract and parol proof was admissible to establish that the defendant was informed that the plaintiff made the contract in question with a view to performing the other.; . . .”

To the same effect, see: McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract*, 19 Minn. L. Rev. 497, 507.

The admission and consideration by the trial court of evidence as to what was within the contemplation of the parties at the time the contract was entered into is fur-

ther supported by two early and oft cited Massachusetts cases. In *Weston v. Boston & Maine R. R. Co.*, (1906) 190 Mass. 298, 76 N.E. 1050, the court dealt with this question as follows, at page 1051:

“But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making the contract. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question as to what damages were in contemplation of the parties to it, *whether a party seeks to recover ordinary or special damages*. That has been laid down in all the cases on the subject.”  
(Emphasis supplied)

Several years later the Massachusetts court again had occasion to pass on this question in *Hanson & Parker v. Wittenburg*, (1910) 205 Mass. 319, 328, 91 N.E. 383, with the following results, at page 384, 385:

“But as damages are assessed as compensation, the amount awarded should be such as the parties at the time of the making of the contract are supposed to have contemplated naturally would follow from the probable consequences of a breach (citing cases). And may be proved by parol evidence, even if the contract is in writing.”

See also: *Globe Refining Co. v. Landa Cotton Oil Co.*, (1903) 190 U.S. 540, 544, 23 S.Ct. 754, 47 L.ed. 1171.

Not only has appellant exhibited a complete lack of understanding of the parol evidence rule, but, in addition, it has made the erroneous assumption (page 22, Appellant's Brief) that although extrinsic evidence of special circumstances is always admissible to en-

large plaintiff's recovery it is never admissible in reduction of the same!

The trial court committed no error in admitting and considering evidence of what was within the contemplation of *both* parties at the time of contracting in its determination of the damages to be assessed in the instant case.

The trial court, by its decision, gave full effect to the terms of the written contract between the parties. Appellant's argument to the contrary must fail, because, as will be demonstrated, appellant's loss resulting from its failure to deliver billets conforming to ASTM A-17/29 specifications to the New Zealand Government was not a natural consequence of and was not caused by appellee's failure to inspect billets in accordance with the terms of its contract with appellant; rather, as the court found, such loss was the natural consequence of and was caused by Seattle Foundry's failure to produce conforming billets and deliver the same to appellant, or appellant's failure to order conforming billets from Seattle Foundry in the first instance.

#### **When Appellee's Inspection Services Were Sought by Appellant**

Appellee will concede for the purposes of argument that the testimony of Mr. Gips set out on page 24 of Appellant's Brief indicates that he had some telephone conversation with Mr. Clark of appellee's San Francisco office prior to the time that appellant actually employed Seattle Foundry to produce the billets in question. However, it should be noted that this testimony also establishes that at the time of these conver-

sations, appellant had decided that the billets would be produced by Seattle Foundry and that an order therefor would be placed with Seattle Foundry in the near future. In this connection, Mr. Gips testified as follows:

“The first contact I had with Pittsburgh Testing Laboratory was by 'phone and I talked to Mr. Clark and I informed him that we *had obtained* steel billets and that his company had been recommended to me to make inspection for quality of the product to be delivered and that we *had intention of*—we were considering placing this order with Seattle Foundry Company in Seattle.” (R. 145) (Emphasis supplied)

Apparently appellant considers it extremely important to establish that appellant contacted appellee before actually placing the order with Seattle Foundry. In this connection it is interesting to note that Mr. Gips, appellant's agent, testified that his verbal understanding with appellee was reached sometime between Monday, May 12, 1952, and Thursday, May 15, 1952, and concerned an inspection of billets *to be produced by Seattle Foundry* (R. 143, Appellant's Brief 24 and 25). If the verbal understanding was to inspect billets to be produced by Seattle Foundry, as distinguished from billets to be produced by *any* supplier with whom appellant might place an order, it necessarily follows that appellant had, prior to such verbal understanding, decided to place the order for billets with Seattle Foundry. In this connection, the trial court made the following finding in its memorandum decision (R. 65, 88):

“The inspection services of Pittsburgh were sought by Gips after Grace *had decided to purchase* the billets from Foundry. The Grace-Pitts-

burgh written contract was negotiated following the contract referred to above between Grace and Foundry.” (Emphasis supplied)

In any event, this question of which came first, appellee or Seattle Foundry, is wholly immaterial. The important consideration as stated by the trial court in its memorandum decision and in its findings of fact is that “... *the services of Pittsburgh were not sought to guide or advise Grace in placing their order or in awarding their contract for the purchase of the billets involved*” (R. 65, 92). Appellant refers to this finding as being “wholly immaterial” (Appellant’s Brief, p. 25). We suggest that this finding, which is uncontradicted and which the record amply supports, is determinative of the issues presented on this appeal. Appellant should not be allowed to recover damages from appellee which resulted from its own actions or from a breach of contract by Seattle Foundry. For recovery of these damages, appellant should have pursued its remedies against Seattle Foundry, not appellee.

Accordingly, it is unimportant that Gips *may* have had some preliminary discussion with appellee prior to making a formal contract with Seattle Foundry. It is equally unimportant to the disposition of this case for what purpose Mr. Gips, as a matter of hind sight, may have sought the inspection services of appellee. Appellee’s only duty to appellant was to inspect steel billets to be produced by Seattle Foundry according to certain specifications; appellee did not intend to and did not in fact undertake to produce these billets, to supervise their production or to assure appellant that Seattle Foundry could or would produce the same (R. 66, 67).

### Appellant's Cases and Authorities on Damages

The majority of the cases cited in support of appellant's Specifications of Error No. 4, No. 5 and No. 6 (Appellant's Brief, 28 to 37, incl.) present a factual pattern wherein the defendant has contracted to sell or supply plaintiff with specific goods or materials which plaintiff, in turn, has contracted to sell to a third person. Illustrative of these cases is *Dally v. Isaacson*, (1952) 40 Wn.(2d) 574, 245 P.(2d) 200 (subcontract to manufacture millwork for plaintiff for army contract); *Sedro Veneer Co. v. Kwapil* (1911) 62 Wash. 385, 113 Pac. 1100 (contract to furnish plaintiff with egg case lumber shooks for resale); and *Martinac v. Bakovic*, (1930) 158 Wash. 193, 290 Pac. 847 (contract to build and deliver fishing boat to plaintiff for specific purposes of fulfilling a fishing contract). These cases would be particularly appropriate to sustain a recovery of damages in an action by appellant against Seattle Foundry. However, they do not support any additional recovery by appellant against appellee. Appellee did not contract to sell or supply appellant with steel billets for delivery to New Zealand. Only Seattle Foundry occupies this position. Accordingly, if such contract to supply steel billets was breached, appellant must look to Seattle Foundry, not appellee, for recovery of the resulting damages.

The additional authorities cited by appellant to sustain its position against appellee, such as 1 Sutherland, *Damages*, (4th Ed.) Sec. 50, contain general rules of law relating to damages recoverable for breach of contract. These general rules are undoubtedly correct; however, appellee does not agree with appellant's ap-

plication of the same to the facts of the instant case. This for the reason that appellant's damages resulted from Seattle Foundry's failure to supply steel billets to appellant as per ASTM specifications, or, in the alternative, resulted from appellant's failure to order conforming billets from Seattle Foundry in the first instance. Appellant's damages did not result from appellee's failure to inspect the steel billets produced by Seattle Foundry according to specifications; accordingly, the general rules relating to damages cited by appellant are inapplicable to the present case. The fallacy in appellant's attempted application of these general rules to the present case is best illustrated by the rule of limitation thereon set forth in 1 Sutherland, *Damages*, (4th Ed.) Sec. 50, at page 187, following a quotation from *Hadley v. Baxendale*, (1854) 9 Exch. 341, 156 Eng. Rep. 145:

"It is to be remembered that there is no relaxation of the rule confining the recovery to the damages *naturally* and *proximately* resulting from the breach in cases where there are such known special circumstances. *Indeed, the same strictness exists to confine the recovery to the immediate consequences.*" (Emphasis supplied)

Appellant seeks to satisfy the requirements imposed by this rule by stating that "appellant's loss arising out of the New Zealand order was proximately caused by appellee's breach, . . . " (Appellant's Brief, 28, 29) and that "The rule of *Hadley v. Baxendale* and the foregoing authorities make it clear appellant's damages arising out of the New Zealand order were proximately caused by appellee's breach of contract" (Appellant's Brief, 32). These statements are, of course, mere con-

clusions of the writer which, as will be hereafter demonstrated, are wholly erroneous.

## II.

### APPELLANT'S CLAIMED DAMAGE NOT CAUSED BY APPELLEE'S FAILURE TO INSPECT

A proper analysis of the proximate cause of appellant's damage must begin with a consideration of certain uncontroverted facts: that appellant's contract with New Zealand and appellant's contract with Seattle Foundry were negotiated by appellant alone without the aid or inducement of appellee (R. 65, 66, 92); that appellant knew that Seattle Foundry intended to supply appellant with *cast* steel billets in performance of this contract (Ex. 9, Appendix 39, R. 77, 95); that Seattle Foundry was equipped to cast steel only and had no facilities whereby it could forge or roll steel (R. 25); and that appellee understood that the billets to be produced by Seattle Foundry and inspected by it were to be *cast* steel billets (R. 76, Ex. A-1, Appendix 42).

Thus, prior to the time that appellant engaged the inspection services of appellee, appellant had either (a) contracted to purchase steel billets according to specifications ASTM A-17/29 from a supplier which was incapable of producing the same, or (b) contracted to purchase *cast* steel billets from such supplier, which billets would not conform to the specifications contained in appellant's contract with New Zealand. In either case, appellant itself had provided a basis for its resulting damage, through no fault of the appellee. Given this set of circumstances, it was impossible for appellant to subsequently avoid a loss arising out



of Seattle Foundry's incapacity or failure to supply appellant with steel billets that had been rolled or forged rather than cast steel billets; the failure of appellee to inspect and reject such billets did not contribute to the non-conforming character thereof.

With these facts in mind, it is suggested that the general rule of damages set forth in 1 Sutherland, *Damages*, (4th Ed.) Sec. 45, p. 170 is particularly apropos to disposition of this appeal:

"In an action founded upon a contract *only such damages can be recovered as are the natural and proximate consequence of its breach*; . . . the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into." (Emphasis supplied)

This rule, of course, must be considered in conjunction with the following rule of limitation announced in the case of *Platts v. Arney*, (1957) 150 Wash. Dec. 33, 309 P.(2d) 372, at pages 374 and 375, as follows:

"The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. *It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed.*<sup>1</sup> He is entitled to the benefit of his bargain, *i.e.* whatever net gain he would have made under the contract. (Citing cases)

*"The plaintiff is not, however, entitled to more than he would have received had the contract been*

---

<sup>1</sup>The contract to which this rule applies is the contract between appellant and appellee not the contract between appellant and Seattle Foundry.

*performed*. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery." (Emphasis supplied)

Appellant is seeking to force appellee to restore appellant to the position that appellant would have been in had *Seattle Foundry* supplied billets to appellant conforming to the New Zealand specifications, not the position that appellant would have been in had appellee performed its contract with appellant. Performance by appellee would not, indeed could not, *assure* appellant that *Seattle Foundry* would produce steel billets conforming to contract specifications, for *Seattle Foundry* was incapable of such production. Appellee did neither induce nor contribute to this inability of *Seattle Foundry*; appellant by its own action agreed to purchase steel billets from a supplier that could not under any circumstances produce the same according to specifications ASTM A-17/29. If appellee had advised appellant that the *cast* steel billets being produced by *Seattle Foundry* were not in accordance with specifications ASTM A-17/29 and that only steel billets that had been rolled or forged would suffice, this information or performance by appellee, would not have assured appellant that *Seattle Foundry* would thereafter produce conforming billets; *Seattle Foundry* was incapable of producing the same. If appellant's contract with *Seattle Foundry* called for steel billets that had been rolled or forged (as distinguished from *cast* steel billets), *Seattle Foundry's* inability or failure to perform the same (through no fault of appel-

lee) would in the ordinary course of events make Seattle Foundry liable to appellant for breach of its contract to supply conforming billets and all consequential damages resulting therefrom, including any loss of profit on the New Zealand contract. In this connection, it is important to note that in such case, if appellant had purchased conforming billets from Isaacson Iron Works, the supplier upon whose original quotation appellant based its resale price to New Zealand, Isaacson's price for supplying such conforming billets to appellant would have been \$36,310.00 (R. 337, 338) not \$33,400.00 as asserted by appellant (Appellant's Brief, p. 35). Thus, appellant's profit on the resale to New Zealand could never have exceeded the difference between the appellant's price to New Zealand, \$37,462.64, and Isaacson's price to appellant, \$36,310.00, or \$1,152.64.

*If appellee had performed its contract to inspect steel billets to be produced by Seattle Foundry according to the specifications, appellant would still have lost the benefit of Seattle Foundry's performance and consequently appellant's anticipated profit upon the New Zealand contract in the sum of \$7,192.60 (using Seattle Foundry's price), without any breach of contract by appellee. In such case Seattle Foundry would have been liable to appellant for all of the direct and consequential damages resulting from Seattle Foundry's failure to supply appellant with conforming billets, including appellant's loss of profit. The only way that appellant could have avoided such loss would have been to assert its claim against Seattle Foundry for breach of contract and thereafter realize upon the same.*

If, on the other hand, appellant's contract with Seattle Foundry called for *cast* steel billets (as distinguished from billets that had been rolled or forged), then in that event Seattle Foundry furnished to appellant billets in accordance with the Seattle Foundry-appellant contract. In such case, if appellee had advised appellant that the cast steel billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29, and that only steel billets that had been rolled or forged would suffice, appellant, if it had rejected the Seattle Foundry billets, would have been liable to Seattle Foundry for breach of contract and consequential damages. In addition, appellant would have lost the benefit of the Seattle Foundry contract and, in order to perform the New Zealand contract, would have been forced to purchase steel billets with specifications ASTM A-17/29 from Isaacson Iron Works for \$36,310.00.

Appellee did not warrant or guarantee to appellant Seattle Foundry's performance of its contract with appellant, and therefore is not responsible for damages sustained by appellant because of Foundry's failure to supply appellant with billets in accordance with specifications ASTM A-17/29. *Gagne v. Bertran*, (1954) 43 Cal.(2d) 481, 275 P.(2d) 15, 20.

As has been demonstrated, appellant would have suffered the loss of Seattle Foundry's performance and, in addition, its profit on the New Zealand contract even if appellee had advised appellant that the *cast* steel billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29. As found by the lower court (R. 79, 80):

“... that, except for the item of compensation paid Pittsburgh for services, the damages claimed by Grace were not the direct and proximate consequence of the breach of contract by Pittsburgh nor within the contemplation of both parties at the time the contract was entered into as a likely consequence of its nonperformance. Grace is not entitled to such damages as claimed for the reasons already set forth.”

As has been demonstrated, even if appellee had advised appellant that the billets being produced by Seattle Foundry were not in accordance with specifications ASTM A-17/29, the only way that appellant could have avoided the loss which it has suffered would have been to prosecute its claim, if any, against Seattle Foundry for breach of contract and recover consequential damages. The failure of appellee to so advise appellant of the non-conforming character of the billets did not render Seattle Foundry *any less liable* to appellant for breach of contract, if any there was. Consequently, appellant's loss was caused not by appellee's failure to act; rather it was caused (1) by Seattle Foundry's breach of contract, or, (2) if Seattle Foundry did not breach its contract with appellant, by appellant itself when it ordered *cast* steel billets from Seattle Foundry.

The principle governing a situation such as this was applied in the case of *Young v. Yeates*, (1922) 153 Minn. 366, 190 N.W. 791, wherein plaintiff sued its rental agents for loss of rentals sustained by plaintiff as a result of a breach of lease by one of plaintiff's tenants. The court held (pp. 792, 793) that although defendants may have violated their contractual duty to

plaintiff, plaintiff suffered no loss as a result thereof and could not recover from the defendants rentals due and owing by the tenant. Similarly, appellant may not recover damages from appellee which are properly chargeable to Seattle Foundry.

Again, in the case of *First Nat. Bank of Mandan v. Larsson*, (1937) 67 N.D. 243, 271 N.W. 289, wherein a collecting bank applied payments received by it to an indebtedness owing to it and not upon a note which it held for collection for its principal, it was held that notwithstanding this breach of duty the principal could not recover the amount of the note from the bank, because the principal had sustained no damage as a result of such breach of duty.

This court has also had occasion to hold that damages, to be recoverable, must have been proximately caused by the breach of contract complained of. *Goddard v. Metropolitan Trust Co. of California*, (C.C.A. 9, 1936) 82 F.(2d) 902. In that case, plaintiff sued the defendant bank for the latter's failure to obtain a proper trust mortgage as security for a loan made by plaintiff to one Dingwell. The lower court sustained a demurrer to plaintiff's complaint and plaintiff appealed from a judgment of dismissal. Thereupon, this court affirmed the judgment of dismissal, stating at pages 904, 905:

“Plaintiff in this case claims as damages the entire amount of his loan to Dingwell, which amount, he alleges, has been wholly lost, but, as previously indicated, the complaint fails to show that this loss was the proximate result of defendant's violation of plaintiff's instructions. The

causal connection, if any, between the violation and the loss is not shown. *The complaint does not allege, nor does it state any fact from which it may be inferred, that compliance with plaintiff's instructions would have prevented the loss complained of.*" (Emphasis supplied)

So, in the instant case, performance by appellee of its contract with appellant would not have prevented the loss of which appellant complains.

Accordingly, the following Finding of Fact made by the lower court upon this issue was properly made and should be affirmed on this appeal (R. 101):

"The only damages suffered by Grace as a direct and proximate result of Pittsburgh's breach of its contract with Grace was the sum of \$3,151.86, to-wit, the sum paid by Grace for Pittsburgh's said inspection services; that such damages were the only damages which were within the contemplation of both parties at the time said contract was entered into as likely consequence of the non-performance of Pittsburgh's contract to inspect billets produced by Foundry."

### III.

#### **APPELLANT'S ALLEGED DAMAGE FOR FAILURE TO SUPPLY ROLLED OR FORGED BILLETS TO NEW ZEALAND WAS NOT WITHIN THE CONTEMPLATION OF BOTH THE PARTIES WHEN INSPECTION CONTRACT MADE**

The trial court found that the damages of \$21,747.24 claimed by appellant were not "within the contemplation of both the parties at the time the contract was entered into as a likely consequence of its (appellee's)

nonperformance" (R. 79, 80). A review of the evidence adduced at the trial will make it readily apparent that the trial court was correct in so finding.

The record shows that appellant knew as early as the last week in April, 1952, or the first two days of May, 1952, that Seattle Foundry would produce cast steel billets. Mr. Murphy of Seattle Foundry so advised Mr. Schlauch of appellant's Seattle office (R. 274, 275, Ex. 54, p. 55). Again, on May 5th, Murphy told Schlauch the billets produced by Seattle Foundry would be "cast steel billets from sand molds" (R. 276, 277). It was during this telephone conversation with Murphy that Schlauch made a pencilled note "cast steel from sand molds" on Exhibit 7 (R. 279). Much later, when Schlauch realized the significance of this notation (and after the claim of the New Zealand Government arose), Schlauch attempted to erase his little quotation from Murphy. But the pencilled note is still legible on Exhibit 7 and serves to point up further that appellant knew from its earliest dealings that Seattle Foundry was offering to produce cast steel billets for the appellant.

This is further corroborated by Mr. Schlauch's letter to Gips dated May 8, 1952, discussing Seattle Foundry's offer in which Schlauch stated, "These billets are cast steel from sand molds . . ." (Ex. 9, Appendix 39). On May 16th Murphy warned appellant that he was furnishing cast steel billets when he stated, "It is our intention to pour these billets in sand molds" (Ex. 23, Appendix 40). In the light of these undisputed facts, can there be any doubt that the trial court prop-



erly found that appellant knew billets produced by Seattle Foundry would be "cast steel billets"? (R. 95)

In addition, there were other warning signals which should have caused appellant to wonder if it had ordered a product from Seattle Foundry which would fill its New Zealand purchase order. Isaacson Iron Works, who had been recommended to Gips as a supplier by Mr. Gleason, his friend at Kaiser Steel Company (R. 119), had offered to supply 750 billets for \$156.50 per net ton and 50 billets for \$177.50 per net ton (R. 271, Ex. 6). Based on these Isaacson prices, appellant added freight charges and a normal profit of about 5% and submitted appellant's bid to the New Zealand Government (which was accepted) to sell New Zealand billets for \$168.35 per net ton (750 billets) and \$190.61 per net ton (50 billets) (R. 120, 187, 188, Ex. 8). Thereafter, Seattle Foundry offered to supply the 750 billets for \$120 per net ton and the 50 billets at \$130 per net ton (Ex. 14). While Seattle Foundry's offer was accepted by the appellant, appellant made no effort to reduce its prices on its resale contract to New Zealand. Accordingly, there was an unusually large differential in the prices of the two suppliers with whom appellant dealt (R. 192). In fact, Mr. Gips testified he had never seen such a large price variation in steel products (R. 193).

Had Seattle Foundry been able to produce steel billets to conform to ASTM A-17/29, Grace would have received a handsome profit. Mr. Schlauch expressed this hope in his letter to Mr. Gips of May 19, 1952 (Ex. 24). On the other hand, Seattle Foundry did not have

the facilities to roll or forge steel billets; hence, it could not have produced steel billets conforming to ASTM A-17/29 (Admitted Fact 18, R. 25). This, of course, made it apparent why Seattle Foundry's price was ridiculously lower than Isaacson's price.

With the foregoing warnings in mind, appellant either knew or should have known that the billets to be produced by Seattle Foundry would not comply with appellant's contract with New Zealand. In appellant's reckless attempt to receive this extraordinary profit without the attendant risk, appellant conceived the idea, in effect, of *insuring* the risk by obtaining appellee's inspection services of Seattle Foundry's product. In effect, appellant sought to insure its unusually high profit. To accomplish its end, appellant not only did not inform appellee of all of the facts, it actually withheld from appellee (according to the testimony of Clark and Robinson) the following essential information regarding the billet transaction: (1) the unusually large price differential between the offers of Isaacson and Seattle Foundry; (2) the details of appellant's purported written contract of May 16, 1952 (Ex. 20, Appendix C to Appellant's Brief); (3) Seattle Foundry's repeated statements to Schlauch that it would furnish "cast steel billets"; (4) the details of appellant's purchase order with New Zealand Government; and (5) the intended end use of the billets by New Zealand for railroad locomotive motion parts and coupler heads.

In spite of these facts and the non-disclosure, appellant in the present case seeks to hold appellee liable for

the claimed damage of \$21,747.24 which appellant refunded to New Zealand. In short, appellant, having either ordered the wrong product from Seattle Foundry, or having ordered a product which Seattle Foundry could not produce, misled appellee by its non-disclosure and now seeks refuge by a strict interpretation of the exchange of letters of May 20 and 21, 1952 (Exs. 21 and 22).

After hearing all the witnesses and considering all the evidence, the trial court refused to hold appellee liable to appellant for the \$21,747.24. As one of the grounds of its decision the lower court found that, under all the facts and circumstances at the time the contract was entered into as disclosed by all the evidence in the case, the damages claimed by appellant were not within the contemplation of both parties at the time the contract was entered into as a likely consequence of appellee's nonperformance (R. 79, 80, 101). The court further found that the only damages which appellant suffered as a direct and proximate result of appellee's breach of its contract with appellant was the sum of \$3,151.86 paid by appellant to appellee (Finding of Fact XXI, R. 101).

The trial court was convinced that *both* appellant and appellee knew at the time the inspection contract was made that the billets to be produced by Seattle Foundry would be cast steel billets (R. 76, 77). It is undisputed that *cast* steel billets would not comply with the ASTM A-17/29 specifications, because such billets had not been rolled or forged. In discussing the knowledge of both parties that Seattle Foundry would produce cast

steel billets, the trial court accepted Mr. Clark's testimony rather than that of Mr. Gips, appellant's witness (R. 77).

In support of his conclusion as to the measure of damages, the trial court relied upon the rule of *Hadley v. Baxendale*, (1854) 9 Exch. 341, 156 Eng. Reprint 145, as enunciated in 1 Sutherland, *Damages*, (4th Ed.) Secs. 45, 50, and *Globe Refining Co. v. Landa Cotton Oil Co.*, (1903) 190 U.S. 540, 23 S.Ct. 754, 47 L.ed. 1171 (R. 69-75 inclusive). The trial court was convinced that the damages resulting to appellant from the delivery of cast steel billets instead of rolled or forged billets under its contract with New Zealand were (1) not the natural and probable consequence of appellee's breach, nor (2) in the contemplation of both parties when their contract was entered into as likely to result from its nonperformance.

The rule of *Hadley v. Baxendale*, *supra*, is recognized by all of the principal authorities in the field of contract damages. See: McCormick, *Damages*, (1935) p. 566. The American Law Institute, *Restatement, Contracts*, (1932) Sec. 330, sets forth the rule in these terms:

"In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract is made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendants to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and foresee the injury."

As applied to the present case, the claim of \$21,747.24 by the New Zealand Government against appellant was not an injury "following in the usual course of events," from the nonperformance by appellee of its inspection contract. Appellee was to inspect the product produced by Seattle Foundry. Appellant made its own contracts with both Seattle Foundry and New Zealand without reliance upon appellee. Seattle Foundry, not appellee, was employed to manufacture and deliver the billets to appellant.

Likewise, appellee had no reason to foresee the claim of New Zealand against appellant for failure of the billets to be rolled or forged. Appellee was instructed to inspect the billets produced by Seattle Foundry. Although appellee advised appellant that such billets would be cast steel billets, appellant already knew that from its negotiations with Mr. Murphy of Seattle Foundry. If this be the case, how can appellee be held to have foreseen that the New Zealand Government would complain about cast steel billets? This is particularly true, because appellee did not know the terms of either of appellant's contracts with Seattle Foundry or New Zealand. Appellee was never given this information.

The explanation and effect of the rule of *Hadley v. Baxendale*, *supra*, is most succinctly stated in McCormick, *Damages*, (1935) pp. 564-565, as follows:

"The significance of the case lies not in the dictum that if notice is given liability *will* attach, for, as we have seen, unlimited liability had previously been the general standard. The history making influence of the case lies in the decision

that liability will *not* attach for damage which was not 'in the contemplation' of the parties '*at the time they made the contract.*' It lays down a general standard of foreseeability of damage as at the time of the bargain, by which judges can prevent or overturn the allowance by juries of claims which would saddle on the defendant losses thought by the judges to be unjust or disproportionate."

In discussing the almost universal acceptance of the rule of *Hadley v. Baxendale*, *supra*, by the American courts, McCormick, *Damages*, (1935) pp. 567-568, observes as follows:

"There has been but little variation of the original phraseology in the use of the principle by American courts, whose opinions still repeat the formula that damages are limited to the 'natural and probable consequences' and those in which in the light of the facts of which they had knowledge, were 'in the contemplation of the parties.' The same idea is occasionally expressed more simply and directly by stating that damages may be given only for those consequences of the breach which were 'reasonably foreseeable at the time the contract was entered into as probable if the contract was broken'."

In conclusion, therefore, there are ample grounds to sustain the trial court's finding that appellant's claimed damage was not in the contemplation of the parties at the time when they made their contract.

## CONCLUSION

As found by the trial court, the alleged damages of \$21,747.24 claimed by appellant were not the direct and probable result of the acts or omissions of appellee, nor were said damages within the contemplation of both parties at the time their contract was entered into as a likely consequence of appellee's nonperformance of its contract to inspect the billets produced by Seattle Foundry. Accordingly, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

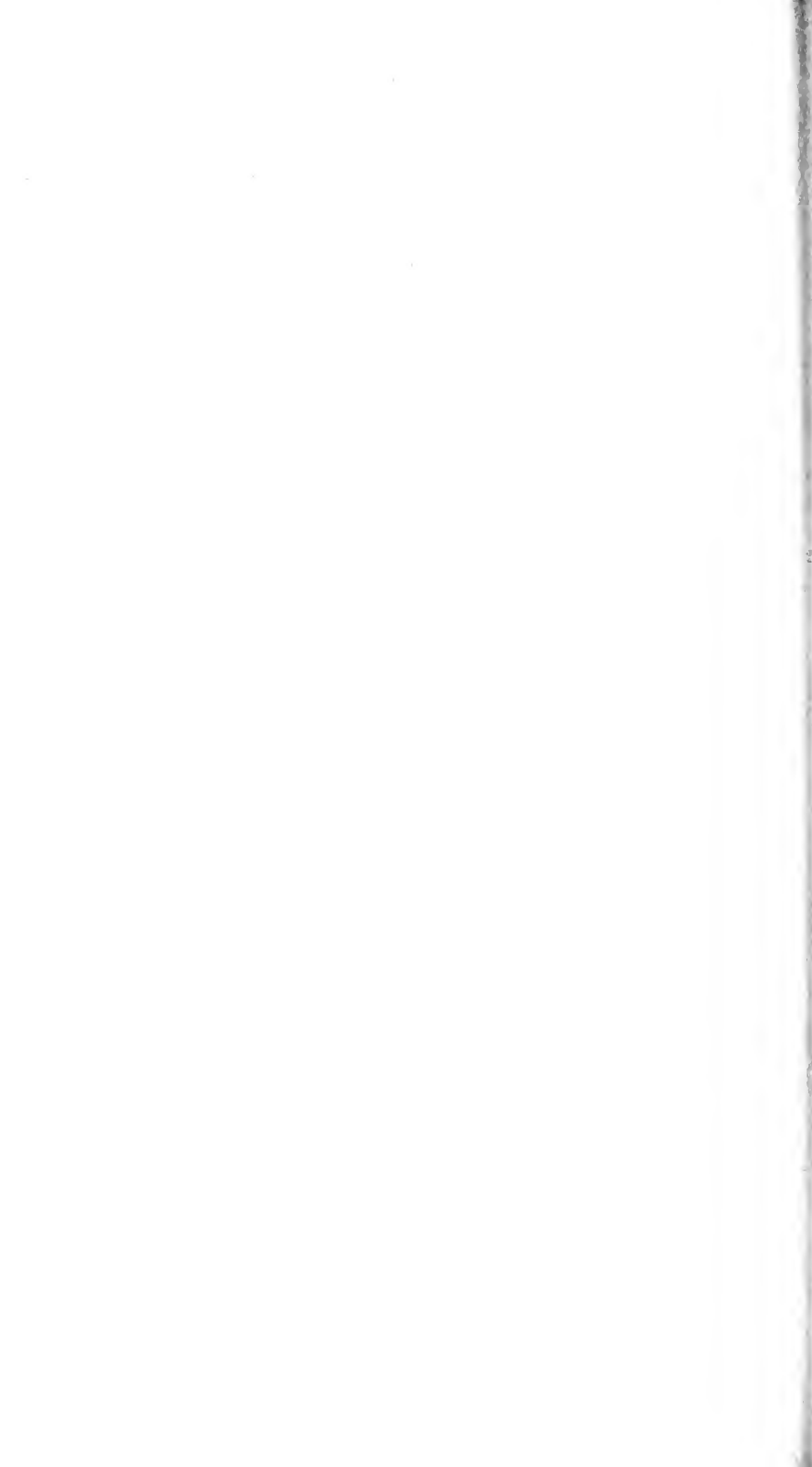
GRAHAM, GREEN & DUNN

BEN J. GANTT, JR.

FRANK T. ROSENQUIST

*Attorneys for Appellee*

*Pittsburgh Testing Laboratory.*





**APPENDIX****EXHIBIT 9****EXPORT DEPARTMENT**

W. R. GRACE & Co.  
408 White Bldg.  
Seattle, U.S.A.

VIA AIR MAIL

SAN FRANCISCO      #3234      5/8/52      #27  
STEEL BILLETS

Our 3208.

Seattle Foundry offer for reply May 30th the following:

“A. Item No. 1 9½"x4"x4½" Billets 750 off ASTM A-17/29 Type A Grade 2 or nearest equivalent  
Price quoted \$120.00 per net ton.

“B. Item No. 2 6"x3"x10' Billets 50 off ASTM A-17/29 Type A Grade 1 or nearest equivalent  
Price quoted \$175.00 per net ton.

“All prices F.O.B., Seattle Foundry Company, Seattle, Wn.

“Note: We could not make Item No. 2 unless proper priorities are released to obtain the nickel.”

To these prices add \$3.00 per 2000# for FAS Seattle. Suppliers can ship within 60/90 days after receipt of order.

These billets are cast-steel from sand molds and Item 1 will weigh approximately 515# each, and Item 2, 604# each.

Yours very truly,  
W. R. GRACE & Co.  
s/ W. H. Schlauch  
W. H. Schlauch  
Export Department

WHS:EB

**EXHIBIT 23**

May 16, 1952

W. R. GRACE & Co.  
408 White Bldg.  
Seattle, Washington

Attention Mr. W. H. Schlauch  
Export Department

Gentlemen:

We have just been informed of receiving the steel billet job as quoted in our letter of May 13, 1952. It is our intention to pour these billets in sand molds. We are wondering what taper you will allow us to draw the pattern out of the sand. We intend to pour both sizes flat, therefore, the taper will be on the 4" sides of Item No. 1 and the 3" sides of Item No. 2.

The steel is to be ASTM A-17/29. This is a ASTM specification put out in 1929. As listed in Kent's Mechanical Engineering Handbook, the composition is as follows:

ASTM A-17/29 Type A Grade 2

Carbon	.15	.25
Manganese	.50	.80
Phos. max.	.045	
Sulphur max.	.05	

Grade 1

Carbon	.05	.15
Manganese	.50	.80
Phos. max.	.045	
Sulphur max.	.05	

No other requirements were listed physical or chemical.

Will you kindly verify the above.

Yours very truly,  
SEATTLE FOUNDRY COMPANY, INC.

JWM:as

James W. Murphy

**EXHIBIT 24****EXPORT DEPARTMENT**

W. R. GRACE &amp; Co.

408 White Bldg.

Seattle, U.S.A.

VIA AIR MAIL

SAN FRANCISCO

#3270

5/19/52

#27

PURCHASE ORDER #8881

STEEL BILLETS

We attach copy of letter received from Seattle Foundry regarding the above order, to which we would appreciate receiving your prompt reply in order that they may start manufacturing these Billets.

Seattle Foundry contacted Pittsburgh Testing Laboratory, Seattle, who did not have a copy of ASTM A-17/29. We would also like to have you confirm that this specification has the composition listed in Seattle Foundry Co.'s letter.

We return signed copy of the above Purchase Order, from which you will note the Billets will not be packed for export shipment but will be shipped loose, also the inspection by Pittsburgh Testing Laboratory will be for our account. Seattle Foundry will also issue their plant certificate.

We assume you sold these Billets basis the prices quoted by Isaacson Iron Works per our #3208, or close to them. We later gave you much lower prices from Seattle Foundry, therefore you should have a handsome margin in this business. Under the circumstances we believe we should participate in a substantial share of the profit instead of the usual 1% buying commission, and would like to have your confirmation.

Yours very truly,  
W. R. GRACE & Co.  
s/ W. H. Schlauch  
W. H. Schlauch  
Export Department

WHS:EB  
Encl.

**EXHIBIT A-1**

Seattle Office

S.F. # 5799

Order from W. R. Grace & Co.

2 Pine St. S.F.

Mr. Gips

200 tons cast steel Billets approximately divided

750 Billets  $9\frac{1}{2}'' \times 4'' \times 4' - 0\frac{1}{2}''$

A-17-29 Type A Grade 2

50 Billets  $6'' \times 3'' \times 10'0$

A-17-29 Type A Grade 1

Sample each heat (ladle sample is best) for analysis  
and send drillings to us about  $1\frac{1}{2}$  oz.

Inspect for visual defects that cannot be chipped out  
easily

Watch Grade 2 for internal pin holes on Sand Cast  
Billets

Steel going to New Zealand Gov. Trade Commission

Price 4.00 hour for inspections and sampling

\$10.00 a sample for C, Mn, P. S & Si

Shipment in 60 to 90 days

Contact Foundry and be prepared to obtain samples  
and inspect billets

No. 15408

---

**United States Court of Appeals  
For the Ninth Circuit**

---

GRACE & Co. (Pacific Coast), a corporation, *Appellant*,  
vs.

PITTSBURGH TESTING LABORATORY, a corporation,  
*Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

---

**APPELLANT'S REPLY BRIEF**

---

WALLACE, GARRISON, NORTON & RAY  
2200 Shell Building  
San Francisco 4, California

BOGLE, BOGLE & GATES and  
603 Central Building  
Seattle 4, Washington  
*Attorneys for Appellant.*

---

THE ARGUMENT PRESS, SEATTLE

FILED

JUN 10 1957



No. 15408

---

**United States Court of Appeals  
For the Ninth Circuit**

---

GRACE & Co. (Pacific Coast), a corporation, *Appellant*,  
vs.

PITTSBURGH TESTING LABORATORY, a corporation,  
*Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

---

**APPELLANT'S REPLY BRIEF**

---

WALLACE, GARRISON, NORTON & RAY  
2200 Shell Building  
San Francisco 4, California

BOGLE, BOGLE & GATES and  
603 Central Building  
Seattle 4, Washington  
*Attorneys for Appellant.*

---





## INDEX

	<i>Page</i>
Reply to Appellee's Statement of Case.....	1
Reply to Appellee's Argument.....	9
I. The Lower Court Erred in Admitting and Considering as Relevant Parol Evidence in Determination of Appellant's Damages (Spec- ifications of Error No. 1 and No 2).....	9
II. When Were Inspection Services Sought?.....	13
III. Appellant's Cases and Authorities on Damages .....	14
IV. Appellee's Cases Are Not in Point.....	16
V. Appellee Responsible for Loss.....	18
Conclusion .....	24

## TABLE OF CASES

<i>American Bureau of Shipping v. Allied Oil Co.</i> (6 C. A. 1933) 64 F.(2d) 569.....	15
<i>Asbury v. Yakima Milling Co.</i> (1926) 137 Wash. 203, 242 Pac. 362.....	2, 12
<i>Bank of North America v. Cooper</i> , 137 U.S. 473, 34 L.ed. 759.....	15, 23
<i>Bradshaw v. Monk</i> (Superior Ct. Wash.) 1952 A.M.C. 53 .....	15
<i>Brown Bag Filling Company v. United S. &amp; A.</i> <i>Company</i> , 107 Atl. 619 (Conn., 1919).....	11
<i>Commercial Bank v. Red River Valley National</i> <i>Bank</i> , 8 N.D. 382, 79 N.W. 859.....	17
<i>El Zarape Tortilla Factory v. Plant Food Corp.</i> (Cal. Appeal, 1949) 203 P.(2d) 13.....	2
<i>Eustis Mining Company v. Beer</i> (D.F. N.Y., 1917) 239 F. 976, 984.....	10
<i>First National Bank of Mandan v. Larsson</i> (1937) 67 N.D. 243, 271 N.W. 289.....	17
<i>Gagne v. Bertran</i> (1954) 43 Cal.(2d) 481, 275 P.(2d) 15.....	16
<i>Goddard v. Metropolitan Trust Co. of California</i> (C.C.A. 9, 1936) 82 F.(2d) 902.....	18
<i>Hadley v. Baxendale</i> , 9 Exch. 341, 156 Eng. Rep. 145	12

	<i>Page</i>
<i>Maryland Casualty Company v. United States</i> (8 C.A., 1948) 169 F.(2d) 102, 110.....	11
<i>Platts v. Arney</i> (1957) 150 Wash. Dec. 33, 309 P.(2d) 372.....	16
<i>Young v. Yates</i> (1922) 153 Minn. 366, 390 N.W. 791	17

### TEXTBOOKS

Vol. II Restatement of the Law Agency §400.....	15
5 Williston on Contracts, Rev. Ed., p. 3764.....	16
F.R.C.P. Rule 75(h).....	13

# United States Court of Appeals

## For the Ninth Circuit

GRACE & Co. (Pacific Coast), a corporation,	<i>Appellant,</i>	} No. 15408
vs.		
PITTSBURGH TESTING LABORATORY, a corporation,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG  
*United States District Judge*

### APPELLANT'S REPLY BRIEF

#### REPLY TO APPELLEE'S STATEMENT OF CASE

Appellee's statement reviews extrinsic and parol evidence occurring prior to the time of the written contract.

Such parol evidence boils down to the fact that Mr. Schlauch knew from information furnished him that steel billets of ASTM-A-17/29 ordered from Seattle Foundry were to be "cast in sand molds" or "sand cast" billets and when transmitted by Mr. Gips to appellee's expert, Mr. Clark, the latter erroneously assumed that the specifications called for castings which he signally designated as "cast steel billets." The evidence appears in factual detail on pages 4 and 5 of appellant's opening brief and in proper perspective.

As under the law of the States of California and Washington such parol evidence is inadmissible, incompetent and irrelevant, it has no bearing on the case. Both jurisdictions recognize that parol evidence varying the terms of a written contract should be ignored; that the written terms supersede all prior oral conversations and negotiations; and that the prior conversations and negotiations and oral agreements are merged in the written contract of the parties.

For example, in *El Zarape Tortilla Factory v. Plant Food Corp.*, (Cal. Appeal, 1949) 203 P.(2d) 13, in reversing the trial court, the court on appeal stated:

“The parol evidence rule is not a rule of evidence. It is one of substantive law. If evidence of conversations and negotiations preceding or contemporaneous to the execution of the writing is admitted it must be ignored. It has no legal force.”

Similarly, in *Asbury v. Yakima Milling Co.* (1926) 137 Wash. 203, 242 Pac. 362, the Supreme Court stated:

“Here we have a writing complete as to every essential of a contract,—parties, subject-matter, price, time and place of delivery. The reference therein to prior conversations is not a reference to them for terms or conditions, but expressly for confirmation of all such conversations which have gone before, and plainly means that all prior parol negotiations and agreements are merged in and limited to the written conditions expressed.”

Appellee is absolutely and completely mistaken in making the following statement appearing on page 5 of appellee's brief:

“Thereafter, on May 16th, appellant's Seattle office sent a letter to Seattle Foundry which purported to be a written contract to supply the bil-

lets (Ex. 20). In spite of the fact that specifications ASTM-A-17/29 called for the billets to be of rolled or forged steel rather than simply cast steel (R. 25), Seattle Foundry wrote appellant on May 16th stating in part, 'It is our intention to pour these billets in sand molds . . . ' (Ex. 23, Appendix 40). The reference to 'pour in sand molds' obviously meant that the Seattle Foundry, which had no facilities for rolling or forging steel, intended from the outset to supply cast steel billets (R. 484). This fact was accepted by appellant who answered Seattle Foundry's letter of May 23rd advising Seattle Foundry, 'we have no objection to your pouring both sides flat' (Ex. 26)."

The letter of May 16th from appellant to Seattle Foundry (Ex. 20) was the formal contract between appellant and Foundry for the purchase of steel billets of ASTM-A-17/29 specifications (Findings of Fact VIII, R. 86), and not a "purported" contract to supply billets.

The letter from Seattle Foundry to appellant dated May 16th (Ex. 23) did not mean it "intended from the outset to supply cast steel billets." It said "The steel is to be ASTM-A-17/29." One inexperienced in steel upon reading the letter would gain no such impression, but would assume that as the order was for steel billets of ASTM-A-17/29 specifications, one would obtain what one ordered. Actually, until after the order was completed appellant's employees had no knowledge that billets produced by Seattle Foundry would not conform to ASTM-A-17/29 specifications (Findings of Fact XII, R. 95).

The method of producing the steel billets as pro-

posed by Seattle Foundry to meet the ASTM standard for steel billets by pouring them in sand molds *was approved by the testing laboratory hired by appellant, the appellee, before being accepted by appellant*, not on appellant's own responsibility as appellee would have this court believe. The Seattle Foundry letter of May 16 (Ex. 23) was submitted to appellee for expert advice. Mr. Gips read the letter to Mr. Clark who approved the procedure outlined. Appellant's advice to Seattle Foundry that there was no objection to "pour both sides flat" was based upon Mr. Clark's advice. This point is conclusive under the Findings of Fact X appearing as follows:

"Upon receipt of the aforesaid letter and on May 19, 1952, Mr. Schlauch wrote his San Francisco office enclosing a copy of the aforesaid letter of May 16, 1952. The letter and enclosure came to the attention of Mr. Gips in San Francisco. Foundry's letter of May 16, 1952, was then read by Gips to Mr. Clark over the telephone. *Mr. Clark advised Mr. Gips that their office in San Francisco had contacted their Seattle office and were supplying Pittsburgh's Seattle office with the necessary information to enable them to inspect the material as required, that there was no objection to pouring the billets as proposed by Foundry and that there had been no recent changes or amendments to the ASTM-A-17/29 specifications, confirmed that the analysis for chemical requirements was correct and gave Gips a physical requirement of the specifications for chipping. Clark also advised Gips that the Seattle office of Pittsburgh would inform the Foundry about the chipping requirements or any other requirements. This information and advice from Clark was trans-*

*mitted by Gips to Grace in Seattle under letter of May 22, 1952. Grace of Seattle then on May 23 acknowledged Foundry's letter of May 16th and authorized the production procedure outlined by Foundry and approved the chemical requirements as listed by Foundry. . . .*” (R. 94)

The appellee on page 9 of its brief states:

“Thereafter, appellant voluntarily refunded the New Zealand Government \$21,747.24 of the total price of \$37,462.64 paid by New Zealand for the billets.” (R. 100)

The Findings of Fact XX, R. 100, relied upon by appellee, does not indicate the payment was “voluntary” but appellee admits that this sum was paid in settlement, and releases obtained (Admitted Facts, Par. 14, R. 22).

There is no evidence that Mr. Schlauch at any time knew that “sand cast” or “billets cast in sand molds” would not comply with ASTM-A-17/29 specifications, or that it made any difference in what manner the steel billets of standard specification were to be produced. The trial court adopted Mr. Schlauch’s testimony that “he had no knowledge of the difference between ‘cast steel’ or ‘sand cast’ billets as distinguished from forged or rolled billets” (R. 77).

The misunderstanding of the expert Mr. Clark that the standard specifications for steel billets called for “cast” billets is unexplained in the evidence other than by the fact he made an erroneous assumption that the material ordered and to be inspected under the ASTM-A-17/29 specifications called for castings. The trial court in adopting appellant’s views in this respect stated:

“Counsel for plaintiff has taken the position that Pittsburgh in seeking to perform its contract assumed from the beginning that the material to be furnished was cast steel billets instead of billets meeting the specifications ASTM-A-17/29 \* \* \*. The court, \* \* \* agrees that such was the situation.”

The established and admitted facts affording a basis for determination of the case may be summarized as follows:

Prior to May 21, 1952, appellant contracted to sell steel billets of ASTM-A-17/29 specifications to the New Zealand Government (Ex. 11). On May 16, 1952, appellant contracted with Seattle Foundry Company of Seattle, Washington, to furnish such billets conforming to the same specifications (Findings of Fact VIII, R. 86, 87).

On May 21, 1952, by an exchange of letters, the appellee contracted with appellant to inspect and certify steel billets ordered from Seattle Foundry to conform to the same specifications (Findings of Fact IX, R. 88-91). The appellee breached that contract by failing to reject steel billets not in conformance with the specifications and in accepting on behalf of appellant and certifying castings as conforming to the specifications (Admitted Facts 15, R. 22-24, Findings of Fact XIV and XVIII, R. 96, 99). The ASTM specifications for steel billets furnished the standard under which appellee as an expert agreed to make inspection and render a certificate of conformity (Findings of Fact XV, R. 96-99).

The billets inspected, passed, approved, accepted and certified to by appellee as conforming to contract speci-



fications, at the time of delivery, had no value other than as scrap steel (Findings of Fact XIV, R. 328, 329).

The appellee was at all times material, in the professional business of inspecting and certifying materials to conform to standard specifications, and in accepting employment with appellant, represented and held itself out as possessing all the knowledge and skill necessary to inspect such steel billets for conformity to said specifications (Admitted Facts 5, R. 19). By its contract (Ex. 21, Ex. 22) appellee agreed to inspect and certify material to appellant's specifications.

Upon the certification by appellee of the castings which it had accepted from Foundry as steel billets conforming to specifications set forth in its contract, appellant paid to Foundry its invoices therefor in the amount of \$27,119.16 (Findings of Fact XVI, R. 99).

For its supposed service in making such inspection and certification, appellant paid to appellee \$3,151.86 (Findings of Fact XVI, R. 99). Appellant shipped the castings approved and certified by appellee as steel billets conforming to the specifications, to the New Zealand Government at Wellington, and supposing they conformed to the contract of sale, and received prompt payment therefor from the New Zealand Government in the amount of \$37,462.64 (Findings of Fact XVII, XX, R. 99, 100). Upon the arrival of such castings, they were rejected by the New Zealand Government (Ex. 42, Findings of Fact XVIII, R. 99). Thereafter, after negotiations, the New Zealand Government submitted an offer of settlement whereby it offered to accept in settlement of its claim against ap-

pellant for breach of contract, the sum of \$21,747.24 (Findings of Fact XIX, R. 100).

Appellant submitted to appellee a copy of the proposed terms of settlement with the request that appellee state whether the claim was correct (Findings of Fact XIX, R. 100), to which request appellee in letter of June 9, 1953, stated: "Their claim for adjustment would seem justified" (Ex. 49). The said sum of \$21,747.24 was paid to New Zealand in settlement of its claim by appellant on August 11, 1954, after taking and obtaining releases from its liability to New Zealand (Findings of Fact XIX, R. 100).

Upon these established facts the court held that plaintiff, appellant, was entitled to recover from defendant, appellee, for breach of contract only the sum of \$3,151.86, the amount paid appellee for its supposed services, instead of appellant's actual loss of \$21,747.24.

In proper perspective, the issues in the case on appeal are whether the trial court erred in admitting and considering as relevant the testimony of preliminary negotiations and documentary parol evidence, both of which tend to vary the meaning of the terms of the contract, to show that the parties had in mind the inspection and certification of castings rather than steel billets of the standard ASTM-A-17/29 specifications, and the issue as to the amount of damages, that is, what damages ought appellant recover in the facts and circumstances of the case.

## REPLY TO APPELLEE'S ARGUMENT

We recognize the weight and force to be given to the trial court's findings of fact. The rule applies with equal force to both parties. The findings of fact, however, favor appellant's position. The court's holding that plaintiff's only damages were in the amount paid appellee, is but a conclusion not within the rule. The court's real finding as to plaintiff's loss is set forth in Findings of Fact XX, R. 100-102, in which it finds that appellant suffered an out-of-pocket loss in the sum of \$14,555.62, plus loss of profits of \$7,192.60.

### **I. The Lower Court Erred in Admitting and Considering as Relevant Parol Evidence in Determination of Appellant's Damages (Specifications of Error No. 1 and No. 2).**

See pages 18-24 of appellant's opening brief.

The appellee deals with this subject on page 13 of its brief under the subheading "Evidence as to Contemplation of Parties Admissible on Issue of Damages."

The appellee must concede that the court resorted to parol evidence in determining the state of mind of the parties at the time the contract was made, namely, that inspection and certification was to conform to castings instead of steel billets. The deviation from the true meaning of the terms of the contract as existed in the minds of the parties was based on appellee's mistaken assumption that the specifications called for castings and upon appellant's information that the steel billets were to be "sand cast" or cast in "sand molds." The issue thus presented is simply a ques-

tion as to whether one who breaches a contract may avoid liability which would otherwise result by his declaring he had in mind a meaning different from the natural and accepted meaning of the terms of the written contract.

On page 20 of our opening brief, we set forth the accepted rule that such declarations by one or both parties are entirely irrelevant. The authorities supporting the rule and cited by us are not mentioned by appellee in its brief. It may be assumed therefore not only the rule but the application thereof is undisputed and the liability of appellee is to be determined by the breach of the terms of the written contract, not by the declaration of appellee as to the meaning or its state of mind at the time the contract was made.

In the much cited case of *Eustis Mining Company v. Beer* (DF. N.Y., 1917), 239 F. 976, 984, Justice Learned Hand said:

“It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; \* \* \* Hence it follows that *no declara-*

tion of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. *When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.*” (Emphasis supplied)

In *Maryland Casualty Company v. United States* (8 C.A., 1948), 169 F.(2d) 102, 110, the court quoted the above language and said:

“ ‘When a contract, complete in itself, fails to incorporate a previous oral agreement, then it must be presumed that the parties have purposely rejected the earlier oral agreement. \* \* \* (citations) No rule concerning the interpretation of contracts is more firmly established than that which excludes the testimony of a party to a written contract than he intended to express a meaning contrary to that which the law imposes upon the language of the contract. \* \* \* (citations) The court may not inquire into the secret or unexpressed intention of one or both of the parties.’ ”

Speaking on the subject in *Brown Bag Filling Company v. United S. & A. Company*, 107 Atl. 619 (Conn.—1919), the court said:

“ \* \* \* the meaning of a written contract is not to be determined by the relative ignorance or knowledge of the parties. \* \* \* ”

\* \* \*

“And the court further referred to the conduct

of the parties as tending to show their understanding of the contract. This was all quite foreign to the real issue with a contract in writing such as the present. Under the pleadings there was but one question. Did rod aluminum mean pure aluminum? Under the written contract it was quite immaterial whether the plaintiff knew or did not know of such special sense. The sale being of specific goods designated as 'rod aluminum' in the written contract as completed and in the written negotiations leading up to the contract, it was the duty of the plaintiff to furnish 'rod aluminum' as that term was ordinarily used in the trade.

\* \* \* "

Appellee failed in its brief to deal with the distinction between evidence which is admissible and relevant to show special circumstances under the second part of the rule of *Hadley v. Baxendale* and evidence which is inadmissible and irrelevant as tending to vary and contradict the terms of the written contract, discussed on pages 19 of our opening brief, which is a tacit admission of the soundness of appellant's position.

Appellee, at the bottom of page 13 of its brief states that the Washington cases cited by us are of "limited application" and do not "deal in any way with the admission or exclusion of parol or extrinsic evidence introduced for the purpose of assessing or determining the amount of damages sustained by plaintiff." On the contrary, all the Washington cases cited determined the damages plaintiff was entitled to recover.

For example in *Asbury v. Yakima Milling Co.* (1926) 137 Wash. 203, 242 Pac. 362, the court reversed the trial court on the question of damages as determined

by the trial court admitting and considering as relevant parol evidence in respect to the terms of the contract. The case was reversed for the reason that damages resulting from the breach of contract based on parol evidence to furnish alfalfa hay "93% pure green color" were not the same as damages for breach of the written contract for failure to furnish alfalfa hay "93% 1st cut." The "measure of damages" differ.

None of the authorities cited by appellee under this heading deal with the "parol evidence rule" or the point under consideration and we will not therefore burden the court with discussing them.

## II. When Were Inspection Services Sought?

See appellee's brief, page 17; appellant's brief, page 28.

To establish its point, appellee has, unintentionally of course, taken advantage of a typographical omission to convey an untruth. On page 18, counsel quotes Mr. Gips as testifying: " \* \* \* I informed him that we had obtained steel billets \* \* \*."

What Gips stated, appears in the original transcript at page 142, "I talked to Mr. Clark and I informed him that *we had obtained an order from the New Zealand Government for steel billets.*" The line of words between "obtained" and "billets" were through printer's error, omitted in the printed record, and the court no doubt will order correction of the printed record. F.R.C.P. Rule 75(h).

Appellant's other point that the main purpose of hiring appellee was to be assured the steel billets or-

dered from Seattle Foundry would conform to the specifications of its New Zealand order go unchallenged.

### III. Appellant's Cases and Authorities on Damages

See appellee's brief, pp. 20, 21; appellant's opening brief, pp. 28-37, inclusive.

Appellee would like to throw the blame for its faulty inspection on Seattle Foundry Company and have this court decide that appellant's damages resulted from liability of Seattle Foundry Company, whose liability is precluded by a dismissal with prejudice (R. 105).

Appellee's indirect approach is the proposition that appellant's authorities "would be particularly appropriate to sustain a recovery of damages in an action by appellant against Seattle Foundry Company"—a matter not in issue here. It should be noted, however, that a claim for damages was made by appellant against Seattle Foundry Company and denied for valid reasons in a letter (Ex. 71) dated November 20, 1953, where in denying liability, Seattle Foundry stated:

"The testing laboratory hired by your company (appellant), Pittsburgh Testing Laboratories, was given full authority by you for final inspection, both chemically and physically. We were not allowed to ship any billets unless they had approved and stamped them. Our records show six complete heats scraped by them plus several individual billets because they did not meet specifications."

Appellant's authorities are most certainly in point.



Contrary to appellee's references there are no rules of damages peculiarly applicable to a contract of agency.<sup>1</sup>

In *Bank of North America v. Cooper*, 137 U.S. 473, 34 L.ed. 759, at page 762, it is said:

"If positive instructions are disobeyed and loss results, *prima facie* liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result."

In an action against a marine surveyor for failure to properly survey a vessel being purchased by plaintiff, the defendant surveyor was held liable for breach of contract irrespective of negligence. *Bradshaw v. Monk* (Superior Ct. Wash.) 1952 A.M.C. 53. The court there stated:

"The contract between the parties hereto was for a survey to determine the seaworthiness of the boat. Capt. Thomas failed to determine such fact, and the defendants are liable for breach of contract, irrespective of negligence \* \* \*"

See also *American Bureau of Shipping v. Allied Oil Co.* (6 C.A. 1933) 64 F.(2d) 509, holding an inspection and classification agency liable for damages arising out of negligent performance of its contract to inspect and report upon the condition of a vessel being purchased by the plaintiff.

---

<sup>1</sup> Vol. II Restatement of the Law of Agency, §400:

"An agent who commits a breach of his contract with his principal is subject to liability to the principal in accordance with the principles stated in the Restatement of Contracts."

Comment:

"b. Damages. In an action for a breach of contract, the agent is subject to liability for harm to the interests of the principal caused by the agent's failure to perform, and also for loss of profits which were reasonably to be anticipated and which would have been made had the promised service been performed. \* \* \*"

#### IV. Appellee's Cases Are Not in Point

We have examined authorities cited by appellee and failed to discern that they have any application to the points presented.

In *Gagne v. Bertran* (1954) 43 Cal.(2d) 481, 275 P. (2d) 15, cited at page 26 of appellee's brief, defendant was employed to make test drills of soil on property plaintiff was about to purchase. It has no bearing on the question of damages for breach of contract as here where appellee not only agreed to make an inspection according to a certain standard of inspection, but also agreed to make a certification that the steel billets ordered by appellant would meet the specifications, and breached its contract in both respects. That was a California case. Action lies in Washington against an agent for breach of contract for failure to make proper inspection irrespective of negligence. *Bradshaw v. Monk*, 1952 A.M.C. 53.

*Platts v. Arney*, (1957) 150 Wash. Dec. 33, 309 P. (2d) 372 cited on page 23 of appellee's brief, has application to the facts of that particular case in which plaintiff *was allowed damages for the net gain he would have made except for breach of contract by defendant*. Authorities cited by the court included Williston on Contracts, §338, wherein the rule of damages is succinctly stated:

“Compensation involves not only assessment of gains prevented by the breach *but also of losses ensuing which would not have occurred had the contract been performed.*” (Emphasis ours) 5 Williston on Contracts, Rev. Ed., p. 3764.

*Young v. Yates*, (1922) 153 Minn. 366, 390 N.W. 791, is cited in appellee's brief at page 27, as governing the situation here. The circumstances of that case have no similarity to the case at bar. The court simply held that plaintiff had failed to prove damages.

*First Nat. Bank of Mandan v. Larsson*, (1937) 67 N.D. 243, 271 N.W. 289, cited in appellee's brief at page 28, involved a suit by a bank on a promissory note. Defendant defended on the ground that the plaintiff bank was his collecting agency and had failed to exercise good faith in the collection of a note put up with plaintiff bank as collateral for a loan. Defendant claimed an offset to the extent of the face value of the note placed with plaintiff for collection. As the note held by the bank for collection was not by the evidence shown to be non-collectible, the court held that the amount thereof was not *prima facie* evidence of defendant's actual loss. The court distinguished the case on the facts from *Commercial Bank v. Red River Valley National Bank*, 8 N.D. 382, 79 N.W. 859, where defendant bank was held liable as a collection agency for failure to follow instructions in collecting two notes left by the plaintiff for collection. The liability for damages was held to extend to the face amount of the notes, which the court held in the circumstances of that case to be *prima facie* evidence of plaintiff's loss.

There is some similarity in these two North Dakota cases to the case at bar. Appellant here is unable to recover damages against Seattle Foundry Company because of its agent's acts in approving and accepting on behalf of appellant material as conforming to the con-

tract specifications, and in failing to reject nonconforming material in breach of its duty. Appellee is responsible for appellant's loss by failing to follow instructions. Appellant's actual loss is *prima facie* evidence of its damages. The burden is on the appellee to show that such a loss would not have occurred if it had followed instructions.

*Goddard v. Metropolitan Trust Co. of California*, (C.C.A. 9, 1936) 82 F.(2d) 902, cited in appellant's brief at page 28 simply holds that the complaint failed to allege a cause of action by reason of uncertainty. The uncertainty was in failure to allege facts that defendant's failure to follow plaintiff's instructions in respect to a trust deed, resulted in damages to the plaintiff. The part appellee quotes from the case is applicable here in the reverse, where it has been conclusively shown that had appellee followed appellant's instructions, the loss to appellant would have been prevented, notwithstanding appellee's mere conclusion to the contrary.

## **V. Appellee Responsible for Loss**

Appellee contends on pages 22-29 of its brief that appellant's damages were not caused by appellee's breach of contract. Its argument is based on the premises contained in the following assertion on page 22 of its brief:

“Appellant knew that Seattle Foundry intended to supply appellant with cast steel billets in performance with this contract.”

More accurately, appellant's information was that the steel billets ordered from Foundry were “cast billets

from sand molds," but appellant was likewise assured by Seattle Foundry that its proposal to furnish steel billets according to the standard ASTM-A-17/29 specification was in order (Findings of Fact VII, R. 85, 87) and the trial court found "until after the order was completed Grace's employees had no actual knowledge that billets produced by Foundry would not conform to ASTM-A-17/29 specifications" (R. 95). Moreover, the inspection contract assured appellant the material could be inspected and certified by appellee to conform to the standard ASTM specifications for steel billets.

When Seattle Foundry agreed to furnish steel billets according to the standard ASTM specifications, appellant assumed that it knew what it was doing. Information the billets would be cast steel in sand molds simply described the method of manufacture, not a deviation from the standard specification for steel billets. There was no reason for appellant to think or believe the steel billets would not be other than called for in the specifications. That appellant's lack of understanding that "cast" billets would not meet the standard specifications for steel billets was not cleared up in time to have prevented all its losses, was due wholly to the stupidity of appellees in not giving proper heed and advice in respect to Seattle Foundry's letter of May 16 (Ex. 23). See Findings of Fact X and XI (R. 92-95).

Desiring, as stated to be assured of mutual understanding as to the specifications, the appellant asked its inspection agency, the appellee, to confirm Seattle Foundry's understanding of them. The letter was forwarded to the San Francisco office and there Mr. Gips

called Mr. Clark on the phone and read the letter to him, and asked his advice in the matter. Clark, still acting under the assumption that the specifications called for castings, approved the proposed method of manufacture and replied that he would give their Seattle office all the information necessary to enable them to make the inspection; but added that there had been no "changes or amendments to the ASTM A-17/29 specifications," which clearly implied that Foundry's interpretation of them was correct (Findings of Fact XI, R. 94).

This incident conclusively confirms the court's finding that appellee went through the form of performing its contract without knowledge of the meaning of its terms. It would seem that this letter would have suggested to Mr. Clark, inasmuch as this specification was not in current use, to refer to the ASTM publication (appellee had it in his library, R. 482) to learn the meaning. Had he done so the whole situation would have been cleared up; Foundry being advised of the meaning of its contract would, presumptively, have set about its performance.

Appellee states (brief 24):

"Appellant is seeking to force appellee to restore appellant to the position that appellant would have been in had Seattle Foundry supplied billets to appellant conforming to the New Zealand specifications."

That is exactly the situation. Because it is due wholly to the fault of appellee that we are not in that position.

Presumptively it would have been so assured be-

cause the presumption is that Foundry, correctly informed as to the requirements of the standard ASTM specifications for steel billets, would have performed it. In any event, we would not be out the \$27,119.16 by reason of lack of "performance by appellee" we paid out for the manufacture, and \$3,151.86 paid for testing or over \$30,000 for castings having a value of approximately \$7,000.00. Appellee argues that even if it had performed its contract, it would have made no difference as in any event, Foundry could not produce the billets. That is a fallacy. There was nothing in the contract to require that Foundry manufacture or produce the steel billets at its plant. See Foundry Contract, Exhibit 20, R. 86. It could have purchased them from Isaacson or elsewhere or provided a means of performance perhaps by arranging elsewhere for subsequent forging. Seattle Foundry, presumptively, was wholly solvent and capable of obtaining the steel billets elsewhere if necessary. Appellee's failure to reject and its approval of castings as steel billets, in any event prevented appellant from seeking its remedy against the manufacture.

On pages 29 to 32 of its brief, appellee argues that appellant's losses were *not supposedly* in the contemplation of the parties when the contract was made. As did the trial court, appellee relies upon the state of the mind of the parties at the time the contract was made as determined by inadmissible parol evidence.

At page 32, appellee states:

"In appellant's reckless attempt to receive this extraordinary profit without the attendant risk, appellant conceived the idea, in effect, of *insuring*

the risk by obtaining appellee's inspection services."

How true, but our insurance proved to be of no value.

It may be noted, too, that after payment of appellee's charges, the profit was not at all extraordinary.

At page 33, appellee states:

"The trial court was convinced that both appellant and appellee knew at the time the inspection contract was made that the billets to be produced by Seattle Foundry would be cast steel billets."

But they equally knew the material ordered and to be inspected was steel billets according to the ASTM standard and only appellee was charged with knowledge the castings required subsequent rolling or forging, a matter concerning which appellant had no knowledge.

Appellee further states:

"It is undisputed that cast steel billets would not comply with ASTM A-17/29 specifications because such billets have not been rolled or forged."

True again; but appellant did not know that fact, and was under no obligation to anybody to know it. On the other hand, appellee equally did not know that fact; but it was obligated to know it.

Appellee (brief 32) states that appellant did not give it information as to the details of the purchase order from New Zealand. That is not true. Clark admitted that Gips told him that the billets were for New Zealand and that the order was for 800 billets of various sizes all to be of ASTM A-17/29 specifications.



That certainly was all the information necessary for appellee to make the proper inspection and to know that appellant intended to make a profit on the transaction.

Appellee again states (brief 35) :

“Appellee was to inspect the product produced by Seattle Foundry.”

That is but partially true, appellant was to inspect the material ordered from Seattle Foundry Company and produced there, which order as appellee well was aware under the terms of its contract, called for steel billets of standard ASTM specifications, and appellee was hired to see that the material furnished conformed to those specifications. It broke its promise to do so by approving and certifying castings as steel billets conforming to ASTM A-17/29 specifications.

In closing we quote again from Justice Brown in *Bank of North America v. Cooper*, 137 U.S. 473, 34 L.ed. 759, at page 762:

“If positive instructions are disobeyed and loss results *prima facie* liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result.”

The trial court has found that positive instructions were disobeyed and that loss in the sum of \$21,747.24 has ensued. Has appellant proved to the satisfaction of this court that “obedience to those instructions would have brought a like result”?

**CONCLUSION**

It is respectfully submitted that the lower court committed reversible error as set forth in appellant's opening brief; that the judgment heretofore entered should be reversed and the case remanded with instructions to enter findings of fact and conclusions of law and judgment awarding appellant the sum of \$21,747.24, with legal interest from August 26, 1954.

Respectfully submitted,

WALLACE, GARRISON, NORTON & RAY  
BOGLE, BOGLE & GATES and  
THOMAS L. MORROW  
*Attorneys for Appellant Grace &  
Co. (Pacific Coast)*

No. 15,410

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

PHILLIP DANIELS,

vs.

UNITED STATES OF AMERICA,

*Appellant,*

*Appellee.*

BRIEF FOR THE APPELLEE.

---

WILLIAM T. PLUMMER,

United States Attorney,

LLOYD L. DUGGAR,

Assistant United States Attorney,

Anchorage, Alaska,

*Attorneys for Appellee.*

FILED

APR - 2 1957

PAUL P. O'BRIEN, CLERK



## Subject Index

---

	Page
Jurisdictional statement .....	1
Statement of facts .....	2
Argument .....	7
Propositions:	
I. Judgment of the court below should be affirmed and the appellant accorded no relief whatsoever in this appeal because in selecting 2255 as his instrument of attack on the judgment below, he has selected an improper and incompetent instrument .....	7
II. No error prejudicial to appellant was committed by the trial court when it accepted a plea of guilty to a first degree murder indictment and thereafter imposed imprisonment for life .....	9
III. The question of the presence or absence of appellant's counsel at appellant's arraignment is involved in such obscurity as that no judicial action can be taken thereon; but a remand to determine the factual issue is not necessary in view of Proposition IV of this brief which establishes that no legal invalidity results from the absence of counsel at the arraignment .....	13
IV. Assuming the absence of appellant's counsel at the latter's arraignment, no prejudicial error stemmed therefrom .....	13
V. If any error there were due to the absence of appellant's counsel at appellant's arraignment, the error was waived .....	15
VI. The files of the court and the record conclusively show that the appellant was not the victim of any coercion and this ground of this appeal therefore fails .....	16
Conclusion .....	18

## Table of Authorities Cited

### Cases

### Pages

Crowe v. United States, CA 4th, 1949, 175 F. 2d 779, cert. den. 70 Sup. Court 478, 338 U.S. 950, 94 L. Ed. 586, rehearing den. 70 Sup. Court 559, 339 U.S. 916, 34 L. Ed. 1341 .....	18
Donnelly v. United States, CA 10th, 1950, 185 F. 2d 559, cert. den. 71 Sup. Court 528, 340 U.S. 949, 95 L. Ed. 684 .....	11, 12
Tillman Foster Etherton v. United States, No. 15,190 in the Circuit Court of Appeals for the Ninth Circuit .....	8

### Statutes

Alaska Compiled Laws, Annotated, 1949, Vol. III, Sections 65-4-1, 65-4-2, 66-10-3, 66-1-5 .....	1, 2, 9, 10, 13, 14, 15
Session Laws of Alaska, 1955, Chapter 195 .....	8
18 U.S.C.A. Section 4202 .....	17
28 U.S.C.A., Sections 1291, 2107, 2253, 2255 .....	1, 2, 8
48 U.S.C.A., Section 101 .....	2

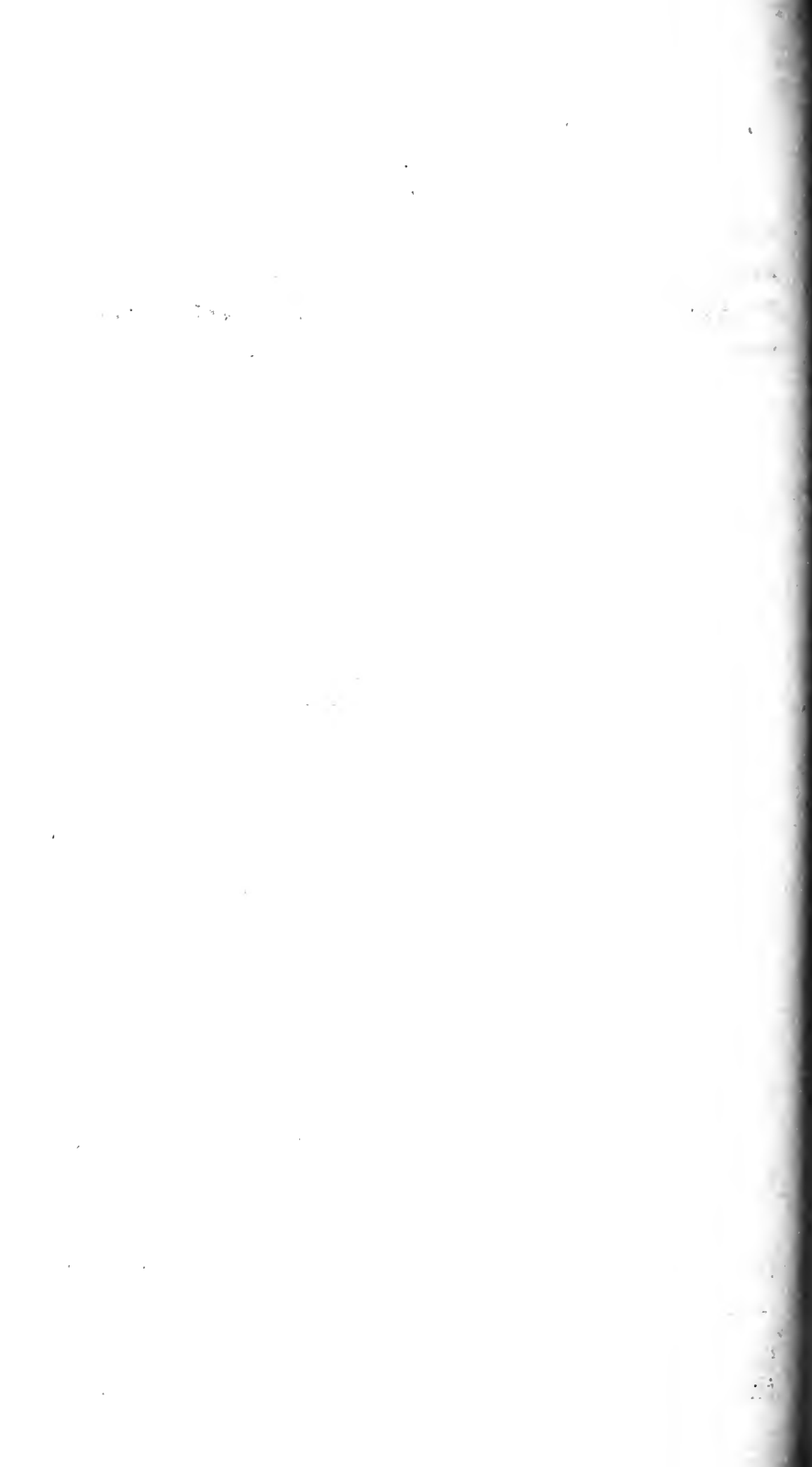
### Texts

6 A.L.R. 694 .....	11
14 Am. Jur., Criminal Law, Section 269 .....	11
Barron and Holtzoff, Federal Practice and Procedure, Section 1961, p. 92 .....	16
Barron and Holtzoff, Federal Practice and Procedure, Vol. IV, Section 2306, p. 93 of 1956 Pocketpart, footnote 63.1 .....	8, 16
Barron and Holtzoff, Federal Practice and Procedure, Volume IV, Section 2306, p. 96 of 1956 Pocketpart, footnote 79.1 .....	16

## TABLE OF AUTHORITIES CITED

iii

<b>Rules</b>	<b>Page</b>
Federal Criminal Rule 32(d) .....	8
Federal Criminal Rule 33 .....	8
Federal Criminal Rule 35 .....	8
Federal Criminal Rule 52(a) .....	14





No. 15,410

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

PHILLIP DANIELS,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF FOR THE APPELLEE.**

---

**JURISDICTIONAL STATEMENT.**

Appellant was convicted upon his plea of guilty in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of a violation of Section 65-4-1, ACLA, 1949.

Upon such plea of guilty and conviction the appellant was sentenced to imprisonment for life.

Almost four years subsequently, Appellant filed in the said District Court a "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellant expressly made this motion under and by virtue of the authority of Section 2255 of Title 28, U.S.C.A.

This Motion was filed in the District Court on September 29, 1956.

Appellant's said motion was denied by the District Court and from such denial the Appellant has prosecuted the instant appeal.

Jurisdiction below was conferred by 48 U.S.C.A. 101. Jurisdiction in this Court is conferred by 28 U.S.C.A. 1291, 2253 and 2255.

---

#### **STATEMENT OF FACTS.**

The facts necessary to be understood in order to comprehend and to determine the points raised by the Appellant on this appeal are easily stated.

The Appellee's first pleading was the indictment charging the Appellant with the crime of first degree murder in the killing by shooting of the Appellant's wife and another woman by the name of Eva Reed. The said indictment was brought under Section 65-4-1, ACLA, 1949. Proceedings were conducted under Criminal No. 2680 in the District Court for the District of Alaska, Third Judicial Division, at Anchorage. The indictment charged that the two murders were committed on March 11, 1952, at Anchorage, Alaska.

The charge was embodied in one count only. The indictment was filed October 22, 1952.

On November 28, 1952, Appellant, apparently without any legal counsel, was arraigned (see page 11 of

the Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence").

The minute order reflecting the arraignment (page 11 of the Appellant's said motion) closes with the following words, "whereupon, said defendant asking time within which to enter his plea or otherwise move against said indictment, the time therefore is continued".

On December 1, 1952, the Appellant again appeared before the Court, this time for the plea and sentence. On this occasion, as the minute order (page 10 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence") reflects, he was represented by counsel, Stanley J. McCutcheon, of Anchorage, Alaska.

According to the last-named minute order Appellant on said occasion pleaded guilty and waived his right to have further time before pronouncement of the sentence. Sentence was apparently thereupon pronounced, and the formal written memorial of judgment, sentence and commitment was signed in open court on the 3d day of December, 1952 (see page 9 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). The sentence imposed was life imprisonment (see page 8 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence").

After serving nearly four years of his sentence and while an inmate of the United States Penitentiary, McNeil Island, Steilacoom, Washington, the Appel-

lant undertook a legal attack on the judgment and sentence. This took the form of a 2255 proceeding and was filed in the District Court on September 29, 1956, in the form of the motion to vacate and set aside the sentence, already alluded to several times above.

Appellant's said motion was denied by the District Court on November 23, 1956, and the formal order of denial was signed by the District Court on January 31, 1957. The formal order of denial is titled "Order Denying Defendant's Motion to Vacate and Set Aside the Sentence" and the same is a part of the record which has been certified to your Honorable Court. It is from the denial of Appellant's said "Motion to Vacate and Set Aside Illegal Judgment and Sentence" that Appellant prosecutes the instant appeal. On page 1 of Appellant's "Designation of Records and Points Relied Upon on Appeal," copy of which was received in the office of Appellee's counsel on February 25, 1957, the Appellant has named four points on which his appeal is relying. In the argument portion of Appellant's "Opening Brief" he sets forth four grounds as the foundation of his appeal. See page 3 et seq. of Appellant's "Opening Brief". These two sets of four grounds each are substantially identical. Stated simply, they are:

1. Legal error committed by the District Court in accepting a plea of guilty to a first degree murder charge and imposition of a life sentence thereupon without the intervention of a jury.

2. Illegality of the arraignment due to the fact that Appellant was not represented there at by legal counsel.

3. Coercion by District Court officials as a result of which Appellant was caused to unwillingly enter a plea of guilty.

4. Violation of Appellant's constitutional rights by virtue of the three grounds named above.

Since these are the four grounds of the appeal, Appellee's Brief will be confined to these four items. Ground No. 4, the constitutional aspect of the claimed errors, will not be specifically treated by appellee in the brief because it is believed that Ground No. 4 is but an aspect of the other three grounds. Appellee's Brief, therefore, will be concerned only with the first three of such grounds.

It is necessary to make reference to two further factual matters, namely, the question of whether Appellant was or was not in fact represented by counsel at arraignment; and the question of whether coercion was or was not employed against Appellant to induce him to make a plea of guilty. These two factual matters will be taken up in the order named.

It is obscure whether Appellant was or was not represented by counsel at his arraignment. The available data on this subject are as follows:

Appellant claims he did not have counsel present at the arraignment (see page 2 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). There is not present in the record before your Honorable Court any transcript of the proceedings of November 28, 1952, when Appellant was arraigned. The District Court's minute order memorial-

izing the proceedings (see page 11 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence") mentions Mr. Seaborn Buckalew's appearing for the Government as the United States Attorney and mentions the presence of the Defendant but does not mention the presence of any counsel for the Defendant. When the District Court, on November 23, 1956, heard and denied Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" no testimony was offered to the Court, on the subject of the presence of counsel at the arraignment, and, hence, this resource of information offers no help on the question of whether counsel was or was not present at the arraignment. Appellee's position is that in such obscurity of fact, no conclusion of fact may be made; but that even if your Honorable Court should assume for argument's sake that counsel was absent at the arraignment, the same would constitute no legal error, nor warrant any relief in this appeal, and this proposition will be more fully ventilated in the ARGUMENT section of this brief.

The second and last factual matter is the question of whether coercion was or was not applied to the Appellant in connection with his guilty plea. Appellant made such a claim in his pleading (see Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" at page 3, Paragraph II; and see page 7 of Appellant's "Opening Brief"). The question of coercion was not made the subject of the presentation of any evidence or testimony in the District Court on November 23, 1956, when Mr. Stanley

J. McCutcheon, the attorney for the Appellant, unsuccessfully argued for the granting of the Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellee's position, however, on this factual issue, is that the record before your Honorable Court conclusively shows that there was, and could have been, no coercion against the Defendant resulting in his pleading guilty. This will be made the subject of one of Appellee's propositions in the ARGUMENT section of this Brief.

---

## ARGUMENT.

### PROPOSITION I.

**JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED AND THE APPELLANT ACCORDED NO RELIEF WHATSOEVER IN THIS APPEAL BECAUSE IN SELECTING 2255 AS HIS INSTRUMENT OF ATTACK ON THE JUDGMENT BELOW, HE HAS SELECTED AN IMPROPER AND INCOMPETENT INSTRUMENT.**

It is but to state the universally accepted to point out that a 2255 proceeding is a limited one, specialized in nature, and limited in orbit. It is not a "catch-all" thing for the purpose of launching any and all sorts of attack on judgments of trial courts. I will not labor the point further, but will content myself with citing one passage from a well-known authority:

"The form of attack is direct, but the grounds for the motion are limited to matters that may be raised on collateral attack, and the motion may not be used in lieu of appeal to review questions which were raised or should have been

raised upon the trial.” Footnote 63.1, page 93, 1956 Pocketpart of Barron and Holtzoff, Federal Practice and Procedure, Volume IV, Section 2306. See also Proposition I in the Argument section of the appellee’s (United States of America) brief in Case No. 15,190 in the United States Court of Appeals for the Ninth Circuit, *Tillman Foster Etherton, appellant, v. United States of America, appellee*, a pending case in your Honorable Court.

What alternatives were open to Appellant to be utilized by him in the selection of attacks upon the validity of the proceeding which he now contests? In tabular form immediately following this sentence, I have listed the five different vehicles of attack, other than the present proceeding, which the Appellant might have chosen, and under our system of jurisprudence, should have chosen, as his weapons of attack, one or more of which vehicles would have been suitable for the errors he claims were committed:

Type of Proceeding	Time	Authority
1. Motion for new trial	5 days	Fed. Cr. Rule 33
2. Appeal	60 days	28 U.S.C.A., Sec. 2255 and Sec. 2107
3. Motion to correct sentence	60 days	Fed. Cr. Rule 35
4. Grant of parole by trial judge (questionable constitutionality).	5 years	Chapter 195, Session Laws of Alaska, 1955
5. Withdrawal of plea of guilty and repleading	At any time	Fed. Cr. Rule 32 (d)

I will not elaborate further on the table of five alternative proceedings, which I believe to be rela-



tively self-evident, for the reason, frankly, that your Appellee does not wish to educate the Appellant into some further and additional proceeding which in all probability would ultimately fail, after dint of much labor expended by both the Government and himself, because of an intrinsic lack of merit in the proceeding.

---

#### PROPOSITION II.

**NO ERROR PREJUDICIAL TO APPELLANT WAS COMMITTED BY THE TRIAL COURT WHEN IT ACCEPTED A PLEA OF GUILTY TO A FIRST DEGREE MURDER INDICTMENT AND THEREAFTER IMPOSED IMPRISONMENT FOR LIFE.**

The two sections of the ACLA 1949 which are applicable to this matter are section 65-4-1, and the second sentence of section 65-4-2. These sections are as follows:

*“65-4-1. First degree murder. That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.”*

*“65-4-2. Obstructing or injuring railroad. Verdict. \* \* \* That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by adding thereto ‘without capital punishment;’ and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.”*

It should be noted that the imposition of the penalty of death is mandatory under section 65-4-1 in the event a defendant is convicted of first degree murder, and, of course, a defendant who pleads guilty is thus convicted.

It is apparent, therefore, that if the learned trial judge had followed the explicit mandate of the territorial statute, the Appellant would have been put to death. The learned judge's failure to obey the legislative will in this connection constituted, of course, legal error. But it is error against the Appellee and in favor of the Appellant. It seems to be obvious that the action of the trial court did not harm the Appellant but rather provided him with a substantial benefit which was improper, namely, the commutation of the death penalty to one of life imprisonment.

Now, that portion of section 65-4-2, above quoted, permits a jury to scale the penalty downward from death to life imprisonment. This, surely, does not mean that jury must be impaneled to determine guilt in a case where a defendant pleads guilty. Such action would be superfluous, a ridiculous thing. No statute should be interpreted so as to achieve such a result. In Appellee's humble opinion, the meaning of this portion of the statute is that when a case of first degree murder is contested and the defendant is found guilty by a jury after such contest, the jury has the power statutorily given to commute the extreme penalty.

Since there was no contest on the issue of guilt and, hence, no intervention by a jury to determine

that issue, that portion of the statute referring to the commutation of the death penalty by the jury is not applicable to this case; and it, therefore, follows that if there be error on the part of the learned trial judge, it was error in favor of the Appellant consisting in the trial judge's failure to impose the death sentence made mandatory by the statute.

Another plain and short answer to Appellant's contention of impropriety in a plea of guilty to a first degree murder charge followed by sentencing without intervention of jury is that it is a principle of jurisprudence that same is permissible. The first sentence of the second paragraph of section 269 of 14 Am. Jur., Criminal Law, is as follows:

“There is no doubt that in the absence of statute, a defendant has a right to plead guilty and, if not prohibited by statute, may be executed upon such plea to a charge of a capital offense,” citing 6 ALR 694.

No Alaskan statute prohibiting such an action has been uncovered in our research nor are we advised of the existence of any such statute.

The federal rule appears to be consonant with the position taken by Appellee and elaborated in the discussion above. See *Donnelly v. United States*, CA 10th, 1950, 185 F.2d 559, Certiorari denied 71 Sup. Court. 528, 340 U.S. 949, 95 L. Ed. 684, to the effect that a district court has jurisdiction to accept a plea of guilty of the capital offense of murder freely and voluntarily entered with the advice of counsel. That the plea was made freely and voluntarily by the

appellant would appear to be shown clearly by the transcript of proceedings in connection with plea and sentence (page 13 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). Also the freedom and voluntariness of the plea is substantiated by implication in the correspondence between Attorney McCutcheon and the Appellant (see pages 15 and 16 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). Further treatment of the freedom and voluntariness with which the plea was entered will be given by Appellee in the discussion under Proposition VI, post, dealing with the absence of coercion in connection with the plea of guilty.

The same case referred to above (*Donnelly v. United States*) also seems to stand for the proposition that a voluntary plea of guilty constitutes a waiver of jury trial and a consent to the imposition of any legal sentence. This should be sufficient to lay at rest the Appellant's contention that the plea of guilty was vitiated by the non-intervention of a jury.

## PROPOSITION III.

THE QUESTION OF THE PRESENCE OR ABSENCE OF APPELLANT'S COUNSEL AT APPELLANT'S ARRAIGNMENT IS INVOLVED IN SUCH OBSCURITY AS THAT NO JUDICIAL ACTION CAN BE TAKEN THEREON; BUT A REMAND TO DETERMINE THE FACTUAL ISSUE IS NOT NECESSARY IN VIEW OF PROPOSITION IV OF THIS BRIEF WHICH ESTABLISHES THAT NO LEGAL INVALIDITY RESULTS FROM THE ABSENCE OF COUNSEL AT THE ARRAIGNMENT.

The obscurity surrounding the question of the presence or absence of Appellant's counsel at the arraignment has been already covered in the Appellee's Statement of Facts in this brief, ante. The Appellee's position is that the District Court was not in error in failing to require the taking of testimony or the reception of evidence on this factual matter because of the fact that even were counsel in fact shown to be absent from the arraignment no legal invalidity would follow. The absence of legal invalidity consequent upon an absence of counsel from a defendant's arraignment is dealt with in the next proposition of this Argument.

---

PROPOSITION IV.

ASSUMING THE ABSENCE OF APPELLANT'S COUNSEL AT THE LATTER'S ARRAIGNMENT, NO PREJUDICIAL ERROR STEMMED THEREFROM.

The Territorial statute requiring the presence of counsel at an arraignment is as follows:

*“Section 66-10-3. Informing Defendant of right to counsel. That if the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have*

counsel before being arraigned, and must be asked if he desires the aid of counsel.”

But failure to comply with this statutory direction must be regarded in the light of Section 66-1-5, ACLA, 1949, which is the classical “harmless error” statute. The text of that section is as follows:

“*Section 66-1-5. Effect of departure from statute.* That neither a departure from the form or mode prescribed by this act, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right.”

Consonant with and to the same general effect is Federal Criminal Rule 52 (a).

Now, in the Appellant’s case he was arraigned and then the said Appellant asked a continuance of the matter in order that he might consider the plea that he would enter or consider the possibility of moving against the indictment. This continuance was granted him. See page 11 of Appellant’s “Motion to Vacate and Set Aside Illegal Judgment and Sentence”. Appellant was subsequently provided with the services of a competent attorney, Stanley J. McCutcheon, Esq., of Anchorage, Alaska. It was three days after the arraignment that Mr. McCutcheon and the Appellant appeared in the District Court for the offering of the plea and the fixing of the time for pronouncing sentence. See page 10 of Appellant’s “Motion to Vacate and Set Aside Illegal Judgment and Sentence.”

The colloquy between all parties of the court and the Appellant and the transcript of the proceedings in connection with the plea and sentence is given verbatim on pages 13 and 14 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence".

Referring to Section 66-1-5 ACLA 1949, set forth verbatim just above, it is the Appellee's position that error, if any, involved in the absence of counsel from the arraignment would scarcely "tend" to prejudice the Appellant in a situation where a plea of guilty was taken and where the Appellant was actually furnished a competent counsel before any plea was asked for or received.

---

#### PROPOSITION V.

**IF ANY ERROR THERE WERE DUE TO THE ABSENCE OF APPELLANT'S COUNSEL AT APPELLANT'S ARRAIGNMENT, THE ERROR WAS WAIVED.**

The Appellee's position on this point is that if the Appellant had wished to be rearraigned in order to have counsel at the arraignment it was open to him to make such a claim when, in this case, he appeared three days after the arraignment for the offering of plea. The three-day period was ample time for him to make up his mind as to whether he wished to assert a demand to be rearraigned (with counsel). Yet the record in this case shows that three days passed from November 28, 1952, until December 1, 1952, and the Appellant was silent on December 1, 1952, when he

offered his plea of guilty and was sentenced for his crimes. Having had adequate time and further, adequate opportunity, to object to the irregularity in the arraignment, he must be held to have waived same.

The waiver of irregularities in the arraignment is a matter of general principle. I cite a portion of the text from the top paragraph on page 92 of Section 1961 of Volume IV of Barran, Federal Practice and Procedure, as follows:

“Objections to irregularities of arraignments may be waived and are waived if not timely made. Thus, a defendant who stands silent while his counsel announces his plea of guilty, has no recourse after entering upon the service of the sentence imposed upon that plea. \* \* \*”

---

#### PROPOSITION VI.

**THE FILES OF THE COURT AND THE RECORD CONCLUSIVELY SHOW THAT THE APPELLANT WAS NOT THE VICTIM OF ANY COERCION AND THIS GROUND OF HIS APPEAL THEREFORE FAILS.**

The Appellee's position on this matter is that the exhibits attached to Appellant's own "Motion to Vacate and Set Aside Illegal Judgment and Sentence" reflect that the Appellant was not the victim of any coercion but was, rather, simply mistaken in the duration of the period required to be served prior to eligibility for parole. Disappointed expectation, of course, constitutes no basis for vacating a sentence. Thus in Volume IV, Barron, Federal Practice and Procedure, 1956 Pocketpart, Section 2306, page 96, at the text for Footnote 79.1, this author states:



“That a defendant, on his plea of guilty, received a longer or more severe sentence than he anticipated is no basis for vacating a sentence,” citing four cases from various federal circuit court of appeals.

A perusal of pages 10 through 20 of Appellant’s “Motion to Vacate and Set Aside Illegal Judgment and Sentence” will disclose that the Appellant and his counsel mistakenly believed that on a sentence to life imprisonment, a prisoner was eligible for consideration for parole at the end of ten years. This, of course, was not the law. The applicable statute providing for eligibility for parole is Title 18, U.S.C.A., Section 4202, which states that a prisoner sentenced to life imprisonment is not eligible for parole until after service of fifteen years of such imprisonment. He and his attorney were both apparently mistaken or ignorant with respect to this statute. It may be that even the then United States Attorney or his then assistants who were connected with the case were mistaken or in ignorance as to this statute. This cannot be known from the state of the record before this Honorable Court nor is it in the least important. At any rate, it is clear from the exhibits attached to the Appellant’s “Motion to Vacate and Set Aside Illegal Judgment and Sentence” that the Appellant was under the impression that he would be eligible for parole in ten years.

It is thus clear that the true gravamen of Appellant’s grumble is his disappointment over learning that by statute he is not eligible for parole in ten years, as he thought, but only after he has served

fifteen years of his imprisonment. It is clear to be seen that this is the basis of his attack on the proceedings in the District Court and that it is disappointed expectation about the time of eligibility for parole that is involved here and not any coercion.

Incidentally, the Appellee would draw the attention of your Honorable Court to the point that it has been held that 2255 is not the proper vehicle for the allegation of coercion where the defendant is represented by counsel and such counsel is not charged with trickery. *Crowe v. United States*, CA 4th, 1949, 175 F.2d 799, certiorari denied, 70 Sup. Court 478, 338 U.S. 950, 94 L. Ed. 586, rehearing denied 70 Sup. Court 559, 339 U.S. 916, 34 L. Ed. 1341.

---

### CONCLUSION.

In view of the propositions of law and of fact set forth by the Appellee, supra, it follows that the Appellant must take nothing by this appeal and the denial by the District Court of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence," from which denial this appeal has been pursued, should be affirmed.

Dated, Anchorage, Alaska,  
March 21, 1957.

Respectfully submitted,

WILLIAM T. PLUMMER,  
United States Attorney,

LLOYD L. DUGGAR,

Assistant United States Attorney,

*Attorneys for Appellee.*

No. 15411.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

---

BRIEF FOR APPELLANT.

---

THOMAS J. GATELY,

112 West Seventh Street,  
San Pedro, California,

*Attorney for Appellant.*

FILED

MAR 12 1957

PAUL P. O'BRIEN, CLERK



## TOPICAL INDEX

	PAGE
Introduction .....	1
Jurisdictional statement .....	1
Statement of the case.....	2
Specification of errors.....	5
Summary of argument.....	6
Argument of case.....	7
I.	
Appellee had authority to use the services of appellant as its forwarding agent .....	7
II.	
Appellee's promise for an act plus appellant's performance of the act formed a unilateral contract.....	9
III.	
Appellee committed a breach of contract.....	10
IV.	
Measure of damages for breach of contract.....	12
V.	
Appellee concedes that appellant is entitled to quantum meruit recovery .....	12
VI.	
Reasonable value should be determined by a consideration of all the evidence and surrounding circumstances.....	13
VII.	
The reviewing court may reverse the finding of the trial court as to reasonable value of appellant's services.....	14
Conclusion .....	16

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Clark v. United States, 95 S. Ct. 539, 24 L. Ed. 518.....	13
Gray v. Cheatham, 52 S. W. 2d 762.....	14
Pacific Maritime Ass'n v. United States, 123 Ct. Cl. 667, 108 F. Supp. 603.....	13
Parish v. United States, 100 U. S. 500, 25 L. Ed. 763.....	12
Smale and Robinson, Inc. v. United States, 123 F. Supp. 457....	8
Southern Pacific Co. v. United States, 192 F. 2d 438.....	9
United States v. Barlow, 184 U. S. 123, 22 S. Ct. 468.....	12
United States v. Smith, 94 U. S. 214, 24 L. Ed. 115.....	12
United States v. Smoot, 15 Wall. 36, 82 U. S. 107.....	10
United States v. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. 746 .....	14

### STATUTES

United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1346(a)(2).....	1
United States Code, Title 41, Sec. 252.....	7
United States Code, Title 46, Sec. 1127.....	7
United States Maritime Board, General Order 70, Amdt. 2, Sec. 243.2 Regulations.....	7

### OTHER AUTHORITIES

2 American Jurisprudence, p. 244.....	14
12 American Jurisprudence, p. 537.....	9
54 American Jurisprudence, p. 572.....	8
54 American Jurisprudence, p. 583.....	11
54 American Jurisprudence, p. 606.....	8
58 American Jurisprudence, p. 518.....	14
9 California Jurisprudence, p. 218.....	11
27 California Jurisprudence, p. 238.....	14

No. 15411.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

---

## BRIEF FOR APPELLANT.

---

### Introduction.

This is an appeal from the final judgment denying the appellant any relief sought in the complaint. The suit was brought for breach of an express contract with the United States. The complaint contains two counts in contract and one count in *quantum meruit*.

### Jursdictional Statement.

Jurisdiction of this suit in the District Court is conferred by 28 U. S. C., Section 1346 (a) (2), based on an express contract with the United States under which the amount in controversy does not exceed \$10,000.00 in amount and the appellant is a resident of the City of Los

Angeles, County of Los Angeles, State of California. [Complaint, pars. I, II, III, R. 3; Ans., R. 7; Findings R. 12.]

A final judgment for appellee was entered October 24, 1956. [R. 15.]

Appellant's notice of appeal was filed December 7, 1956, within the statutory period. [R. 15.] Jurisdiction of this court is conferred under 28 U. S. C., Section 1291 (65 Stat. 726, Act of October 31, 1951).

### **Statement of the Case.**

Appellant is a duly licensed freight forwarder engaged in business in the City of Los Angeles, State of California.

The Pacific Westbound Conference is an association of ocean carriers operating between the West Coast and the Orient.

General Services Administration is an administrative branch of the United States Government.

Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to freight forwarders. Consequently government agencies entered into contracts with licensed freight forwarders for the handling of government shipments. In June, 1950, appellant submitted a low bid of 6½ cents per ton or a minimum charge of \$7.50 per shipment and was awarded a contract with General Services Administration. The main reason for appellant's low bid was to get his name on the list of approved forwarders and demonstrate the quality of his work to the government. [R. 23.] This contract expired by its own terms on June 30, 1951.

In June 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid



a brokerage fee of  $1\frac{1}{4}\%$  of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration offering to perform forwarding services at no charge to the government in view of the fact that he would receive the said brokerage payment from the carrier. [Ex. 2.] On July 9, 1951, General Services Administration replied to appellant's letter and stated in substance that in view of the payment of said brokerage by the carrier to forwarders designated by the shipper no contract with the government was necessary, but the government would rotate their shipments among licensed forwarders. [Ex. 3.]

With this common understanding of the parties hereto as to the payment of brokerage by the carrier designated by the shipper, the appellee on or about July 15, 1956, requested appellant to act as its agent in performing forwarding services on appellee's shipments and continuously thereafter requested and used appellant's services as a forwarding agent until August, 1953. Appellant performed all services requested by appellee during this period and repeatedly demanded that appellee file with the said Conference a designation of the appellant as agent of the appellee. In lieu of filing the said designation appellee supplied appellant with various reasons as to why the designation could not be filed at that time, but promised that the matter would be straightened out. The main excuse of appellee for not filing said designation was the rule of said conference that appellant be designated as an agent who actually booked the cargo. Appellee insisted that it was the policy of the appellee to book its shipments and the appellee refused to either allow the appellant to book the cargo or credit the appellant with the booking.

Due to this refusal of the appellee to file said designation the appellant was unable to collect earned brokerage fees in the amount of \$8,543.72 from the member carriers.

Appellant submitted a claim to the appellee in the sum of \$238.48 for postage expenses incurred in performing the said requested forwarding services on appellee's shipments. This claim was approved by the appellee and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation lost in the amount of \$8,305.24 due to appellee's refusal to designate him as its agent. Appellee conceded that appellant had rendered valuable services to appellee and agreed to pay appellant on a *quantum meruit* basis. As a basis for determining the reasonable value of appellant's services the appellee referred to the rates paid appellant under the prior expired contract and offered appellant the sum of \$1,881.10 in full settlement of his claim. Appellant refused this offer on the ground that reasonable compensation should be based first on the agreed rate of compensation, to wit,  $1\frac{1}{4}\%$  of the ocean freight charge, or in the absence of such an agreement reference should be made to the cost to industry for similar services in the Los Angeles area. Appellee refused to offer more than the original sum of \$1,881.10. In August, 1954, appellee changed its procedure by tentatively booking the cargo in Washington and allowing the freight forwarder to confirm the booking. Under this new policy appellee filed a designation of appellant as its agent with the said Conference in September, 1954, and from that date on appel-

lant has been paid brokerage by the member carriers on all shipments he forwarded for the appellee.

Appellant instituted the action herein to recover compensation lost by him during the period June, 1951, to August, 1953, due to the unjustified refusal of appellee to designate him as its agent.

### **Specifications of Errors.**

The points upon which plaintiff appellant will reply on appear on pages 16 and 17 of the Printed Record.

1. The court erred in holding and deciding that appellant and appellee did not enter into any contract concerning the subject matter of this action.
2. The court erred in holding and deciding that appellant performed certain forwarding services on shipments of the appellant with the knowledge, approval and consent of the appellant.
3. The court erred in holding and deciding that the reasonable value of the services which appellant performed for the benefit of appellee is the sum of \$1,881.10.
4. The court erred in holding and deciding that no sum is presently due by appellee to appellant for services performed by appellant for appellee.
5. The court erred in holding and deciding that appellant shall take nothing by this action.

### Summary of Argument.

On the contract counts appellant's argument is four-fold.

1. General Services Administration had authority to use the services of appellant as a private freight forwarder.
2. In view of the common understanding of the parties as to payment of brokerage, the acts of appellee in requesting appellant to act as its agent in performing forwarding services and the performance by appellant of said requested services formed a unilateral contract or a series of unilateral contracts between appellant and appellee.
3. Appellee committed a breach of contract.
4. The correct measure of damages for breach of contract is the amount of profits lost by appellant as a direct result of said breach.

On the *quantum meruit* count, the argument is three-fold:

1. Appellee concedes that appellant is entitled to *quantum meruit* recovery.
2. Reasonable value for requested services rendered should be based on the agreed rate of compensation under which said services were performed, or, in the absence of such an agreement, reasonable value should be determined by the cost to industry in the same locality.
3. The Appellate Court may reverse the findings of the lower court as to reasonable value.

## ARGUMENT.

### Appellee Had Authority to Use the Services of Appellant as Its Forwarding Agent.

In the court below appellee attempted to defend the charge of breach of contract on the ground that the officer of General Services Administration who requested said services was not a contracting officer and had no authority to bind the appellee.

The Bland Act, 46 U. S. C., Section 1127 (56 Stat. 176) and United States Maritime Board, General Order 70, Amendment 2, Section 243.2 Regulations, authorize and require General Services Administration to use the services of private freight forwarders.

Title 41, U. S. C., Section 252, authorizes General Services Administration to negotiate contracts without advertising providing the aggregate amount involved does not exceed \$1,000.00, or the contract is for personal or professional services.

Mr. Salisbury, Director, Storage and Transportation Division of General Services Administration was charged with the duty of dispatching shipments of said agency and in such capacity had authority to designate the carrier and forwarding agent for each shipment. By requesting appellant to act as forwarding agent said officer did not bind appellee to pay for the cost of appellant's services, but did bind the appellee to perform any and all obligations arising from performance of the requested acts. The fact that appellee subsequently became liable to appellant because of its refusal to fulfill said obligations, does not negate the original authority of the officer of the appellee.

American Jurisprudence states the general rule applicable to contracts with the United States.

“The formation of contracts between private individuals and the Federal government is governed by the same principles which govern formation of contracts between private persons.”

54 Am. Jur. 572, Sec. 62.

“But it is only liable upon those contracts entered into by its duly authorized officers or agents, where such officers or agents are acting within the scope of their authority on behalf of the government.”

54 Am. Jur. 66, Sec. 93.

The argument of counsel for appellee that Mr. Salisbury had no authority to bind appellee is without merit. Appellee paid the charges of the carriers selected by said officer and also paid appellant's claims for expenses incurred in forwarding said shipments. It is illogical to contend that in the same transaction an officer has authority to bind appellee to pay the carrier and the expenses of the forwarding agent, but has no authority to bind appellee for compensation of the forwarding agent in handling the shipment.

In the case of *Smale and Robinson, Inc. v. United States* (1954), 123 F. Supp. 457, District Judge Mathes stated:

“Acts or omissions of agents lawfully authorized to bind the United States, or *direct its course of conduct* during a particular transaction will work estoppel against the government if agents acted within the scope of their authority.”

In the case of *Southern Pacific Co. v. United States*, 192 F. 2d 438, Judge Goodrich stated:

“Where army transportation officer had charge of shipping obsolete army equipment sold by War Assets Administration, officer had *incidental authority*.”

Further refutation of appellee's arguments can be found in the fact that General Services Administration continues to employ private freight forwarders on the same basis. If the acts of Mr. Salisbury were unauthorized when he employed appellant as an agent, why does appellee continue to use the same procedure?

**Appellee's Promise for an Act Plus Appellant's Performance of the Act Formed a Unilateral Contract.**

The common understanding of the parties that appellant would receive brokerage from the carrier as an agent designated by the shipper is found in appellant's letter of July 3, 1951 [Ex. 2], and appellee's reply. [Ex. 3.] In view of this meeting of the minds the performance by the appellant of each act requested by appellee constituted an acceptance of appellee's offer for an act.

American Jurisprudence sets forth a clear definition of the rule of formation of a contract by performance of an act:

“In reference to the sufficiency of an acceptance, there is a distinction between an offer to make a contract executory on both sides and an offer of promise for an act. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed.”

12 Am. Jur. 537, Sec. 43.

American Jurisprudence states the general rule applicable to contracts with the United States.

“The formation of contracts between private individuals and the Federal government is governed by the same principles which govern formation of contracts between private persons.”

54 Am. Jur. 572, Sec. 62.

“But it is only liable upon those contracts entered into by its duly authorized officers or agents, where such officers or agents are acting within the scope of their authority on behalf of the government.”

54 Am. Jur. 66, Sec. 93.

The argument of counsel for appellee that Mr. Salisbury had no authority to bind appellee is without merit. Appellee paid the charges of the carriers selected by said officer and also paid appellant's claims for expenses incurred in forwarding said shipments. It is illogical to contend that in the same transaction an officer has authority to bind appellee to pay the carrier and the expenses of the forwarding agent, but has no authority to bind appellee for compensation of the forwarding agent in handling the shipment.

In the case of *Smale and Robinson, Inc. v. United States* (1954), 123 F. Supp. 457, District Judge Mathes stated:

“Acts or omissions of agents lawfully authorized to bind the United States, or *direct its course of conduct* during a particular transaction will work estoppel against the government if agents acted within the scope of their authority.”



In the case of *Southern Pacific Co. v. United States*, 192 F. 2d 438, Judge Goodrich stated:

“Where army transportation officer had charge of shipping obsolete army equipment sold by War Assets Administration, officer had *incidental authority*.”

Further refutation of appellee's arguments can be found in the fact that General Services Administration continues to employ private freight forwarders on the same basis. If the acts of Mr. Salisbury were unauthorized when he employed appellant as an agent, why does appellee continue to use the same procedure?

**Appellee's Promise for an Act Plus Appellant's Performance of the Act Formed a Unilateral Contract.**

The common understanding of the parties that appellant would receive brokerage from the carrier as an agent designated by the shipper is found in appellant's letter of July 3, 1951 [Ex. 2], and appellee's reply. [Ex. 3.] In view of this meeting of the minds the performance by the appellant of each act requested by appellee constituted an acceptance of appellee's offer for an act.

American Jurisprudence sets forth a clear definition of the rule of formation of a contract by performance of an act:

“In reference to the sufficiency of an acceptance, there is a distinction between an offer to make a contract executory on both sides and an offer of promise for an act. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed.”

12 Am. Jur. 537, Sec. 43.

In the case of *United States v. Smoot*, 15 Wall. 36, 82 U. S. 107, Mr. Justice Miller, speaking for a unanimous court, stated:

“This court will not apply to contracts made by the government, nor give to its action under such contracts, a construction and effect different from those which courts of justice apply to contracts between individuals.”

### **Appellee Committed a Breach of Contract.**

The Rules of the Pacific Westbound Conference require that an agent, in order to collect brokerage, must be designated by the shipper as an agent authorized to book the cargo. [Ex. 13.] Appellee's knowledge of this Rule is found in the letter of July 9, 1951 [Ex. 3], wherein appellee stated in part: “Conference carriers now pay brokerage to Freight Forwarders as designated by the shipper.” Upon the formation of each unilateral contract as above stated appellee became obligated to perform its part by designating appellant as its agent authorized to book the cargo. Appellee had the choice of altering its policy by permitting appellant to confirm the booking or in the alternative crediting appellant with the actual booking. Instead appellee remained adamant in its bureaucratic policy of refusing to perform its obligations, claiming that it would violate the policy of General Services Administration. The fact that this procedure was changed in 1954 by the addition of the word “tentative” to a booking of cargo in Washington, demonstrates forcibly that such procedure was not impossible during the period 1951 to 1954.

American Jurisprudence clearly defines the duty of the appellee:

“The United States must do whatever is necessary on its part to enable the other contracting party to

comply with the terms of the contract and if it fails to do so, it is liable to the other party for such damages assuming that it has given consent to be sued in the circumstances."

54 Am. Jur. 583, Sec. 69.

California Jurisprudence states the rule of compensation of an agent:

"A broker, as an agent, ordinarily looks to the principal for compensation. However, the employment contract may provide that the broker is to look to the other side for his compensation. In such a case, the principal is under no obligation to see that the broker is paid for his services unless the principal renders it impossible for the broker to become entitled to payment by the other side by wrongfully refusing to perform the contract negotiated."

9 Cal. Jur. 218, Sec. 64.

In the instant case appellant looked to the carrier for his compensation. However, due to the unjustified refusal of appellee to file the required designation it became impossible for appellant to collect his brokerage from the carrier. Due to this breach of contract appellee became liable to appellant for the brokerage earned by appellant.

The trial judge commented on the failure of the appellee to designate appellant as its agent:

"The Court: All the government had to do was give the authority. It didn't cost the government a cent to give this authority. They sit back and don't do anything for three years. Why?

Mr. Lavine: At that time they had not adjusted their procedures so that they wanted to give him that authority or any other agent so situated." [R. 41.]

Commenting on the refusal of the steamship companies to pay the 1¼% brokerage to appellant, the court said:

“The Court: But they didn’t pay it to the plaintiff because the government sat on its hands and wouldn’t give this authorization. Is the plaintiff supposed to lose this money because the government did that?” [R. 44.]

### **Measure of Damages for Breach of Contract.**

Speaking for a unanimous court, Mr. Chief Justice Waite in the case of *United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115, stated:

“When a breach of contract interferes with the proper performance of a contract in accordance with its terms, the injured party may recover damages to the extent at least of any loss which was the necessary consequence of such interference.”

See, also:

*Parish v. United States*, 100 U. S. 500, 25 L. Ed. 763;

*United States v. Barlow*, 184 U. S. 123, 22 S. Ct. 468.

### **Appellee Concedes That Appellant Is Entitled to Quantum Meruit Recovery.**

At the trial counsel for appellee conceded as follows:

“Mr. Lavine: The government does not think he should go without any compensation, and it is on that basis that we grant he is entitled to *quantum meruit* recovery.” [R. 42.]

“The Court: The government is willing to admit that the plaintiff is entitled to something?

Mr. Lavine: Yes.” [R. 43.]

**Reasonable Value Should Be Determined by a Consideration of All the Evidence and Surrounding Circumstances.**

For the obvious reason that plaintiff's bid under the expired contract was the lowest price available, the government employed this basis in determining the reasonable value of appellant's services between 1951 and 1953.

The prevailing rule of law is that the reasonable value of the services rendered by appellant at the request of appellee should be based on the agreed rate of  $1\frac{1}{4}\%$  which was the agreed rate of compensation, or, in the absence of such an agreement, reasonable value of appellant's services should be determined by reference to the cost to industry for similar services in the same area. In the instant case the common understanding of the parties as to the rate of compensation to be paid appellant is shown in Plaintiff's Exhibits 2 and 3.

In deciding the question of reasonable value in the case of *Clark v. United States*, 95 S. Ct. 539, 24 L. Ed. 518, Mr. Justice Bradley stated:

“Value for the use of vessel per day, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract.”

In *Pacific Maritime Association v. United States*, 123 Ct. Cl. 667, 108 F. Supp. 603, Judge Whitaker answering the question: “What is fair compensation?” stated:

“No better answer to the question of what is fair compensation, than what the parties agreed upon, to wit, 1.7 cents per hour.”

At the trial appellee contended that recovery by the appellant should be measured by the benefit conferred on the appellee. California Jurisprudence clearly and decisively refutes this contention:

“What is a reasonable compensation for the services rendered does not depend on any one factor but must be ascertained from all the evidence and circumstances of the case.”

27 California Jurisprudence 238, Sec. 44.

See, also:

2 Am. Jur. 244, Sec. 311;

58 Am. Jur. 518, Sec. 10.

In *Gray v. Cheatham*, 52 S. W. 2d 762, 763, the court held:

“Reasonable value of services rendered would be what was the reasonable price paid for such service or like services in the community where such services or like services were rendered.”

The rate of brokerage commonly paid for forwarding services in the PWC is  $1\frac{1}{4}\%$  of the ocean freight charge. [R. 30; Pltf. Ex. 23.]

### **The Reviewing Court May Reverse the Finding of the Trial Court as to Reasonable Value of Appellant's Services.**

In *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 746, Mr. Justice Reed stated:

“The Supreme Court may, under the provision of Rule 52(a) \* \* \* reverse a finding of fact in an action so tried where although there is evidence to support the finding, the reviewing court on the entire

evidence is left with a definite and firm conviction that a mistake has been committed.”

In holding for the government, the trial judge failed to consider the correspondence between the parties which clearly shows the common understanding of the parties as to the rate of compensation to be paid appellant. Further, the trial judge refused to give credence to the uncontradicted testimony of the plaintiff.

Referring to the services rendered between 1951 and 1953 appellant testified:

“Q. (By Mr. Gately): Did you perform all these requested services expecting compensation? A. Yes, I did.

Q. What compensation did you expect? A. I expected to receive  $1\frac{1}{4}$  per cent of the ocean freight.

Q. For each shipment did GSA send you instructions how to handle it? A. Yes. Each shipment was a separate set of instructions.

Q. Did they mention anything about the capacity in which you were acting? A. Yes. We were their designated forwarding agent.

Q. Did you fully perform all the requested services during this period? A. Yes, I did.

Q. Did you believe at any time you were working under the rate of the expired contract? A. Never.”

Finally the trial judge failed to consider the cost to industry for similar services in the Los Angeles area. [Pltf. Ex. 23.]

If this honorable Court upholds the decision of the lower court the rule will be established in the Ninth Circuit

that reasonable value should be determined by the lowest charge or price for which plaintiff ever performed similar services.

**Conclusion.**

The judgment below should be reversed and appellant should be awarded a judgment against appellee for \$8,305.00.

Respectfully submitted,

THOMAS J. GATELY,

*Attorney for Appellant.*



No. 15411.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

---

## BRIEF FOR APPELLEE.

---

LAUGHLIN E. WATERS,

*United States Attorney,*

RICHARD A. LAVINE,

*Assistant U. S. Attorney,*

*Chief of Civil Division,*

600 Federal Building,

Los Angeles 12, California,

*Attorneys for Appellee.*

FILED

APR - 4 1957

PAUL P. O'BRIEN, CLERK



## TOPICAL INDEX

	PAGE
Jurisdictional statement .....	1
Statement of the case.....	1
Summary of argument.....	4
Argument .....	6
I-A.	
Salisbury had no authority to contract for GSA.....	6
I-B.	
There was no unilateral or bilateral contract entered into between appellant and GSA.....	8
I-C.	
There was no breach of contract on the part of GSA.....	9
I-D.	
There are no damages arising out of breach of contract.....	9
II-A.	
Appellant has already received quantum meruit compensation from appellee in the reasonable amount of appellant's services .....	10
II-B.	
Reasonable value of services is an amount equal to what appellant would have received if the old contract had remained in effect .....	10
II-C.	
The finding of the trial court as to the reasonable value of appellant's services should not be disturbed on appeal.....	13
Conclusion .....	14

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Baetjer v. United States, 143 F. 2d 391.....	11
Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 92 L. Ed. 10, 68 S. Ct. 1.....	6
Montana Power Co. v. Federal Power Commission, 186 F. 2d 491, cert. den. 340 U. S. 947, 95 L. Ed. 683, 71 S. Ct. 532....	7
Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 .....	11
Reconstruction Finance Corp. v. Martin Dennis Co., 195 F. 2d 698, 701 .....	6
Smale and Robinson, Inc. v. United States, 123 F. Supp. 457....	7
State of Utah v. United States, 284 U. S. 534, 76 L. Ed. 469, 52 S. Ct. 232.....	7
United States v. California, 332 U. S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658.....	7
United States v. Ham, 187 F. 2d 265.....	11
United States v. Meyer, 113 F. 2d 387, cert. den. 311 U. S. 7..	11
United States v. New River Collieries, 262 U. S. 341, 43 S. Ct. 565, 67 L. Ed. 1014.....	11
United States v. San Francisco, 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749.....	7
United States v. Stewart, 311 U. S. 60, 61 S. Ct. 102, 85 L. Ed. 40 .....	6
United States v. Toronto Nav. Co., 338 U. S. 396, 70 S. Ct. 217, 94 L. Ed. 195.....	11
Utah Power & Light v. United States, 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387.....	7
Washington Home for Incurables v. Hazen, 70 F. 2d 847.....	11
Welch v. TVA, 108 F. 2d 95.....	11
Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882.....	6
Wildermuth v. United States, 195 F. 2d 18.....	6

## STATUTES

United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1346(a) (2).....	1

No. 15411.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California, Central Division.

Hon. Harry C. Westover, Judge.

---

## BRIEF FOR APPELLEE.

---

### Jurisdictional Statement.

The trial court had jurisdiction of this action by virtue of Section 1346(a)(2) of Title 28, United States Code, and this court has jurisdiction of this action under Section 1291 of Title 28, United States Code.

### Statement of the Case.

Appellant was and is a duly licensed freight forwarder, and engaged in such business in the City of Los Angeles, State of California. The Pacific Westbound Conference was and is an association of ocean carriers operating from West Coasts Ports. Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to

freight forwarders. The General Services Administration, which is a part of the executive branch of the United States, did pay a brokerage fee to freight forwarders prior to that time.

In June, 1950, appellant submitted a bid of  $6\frac{1}{2}$  cents per ton, or a minimum charge of \$7.50 per shipment, and was awarded a contract with General Services Administration. [Ex. 1.] At the trial appellant stated that the reason he submitted a bid of  $6\frac{1}{2}$  cents a ton was to get on the list of government approved forwarders of shipments. [Tr. p. 23.] This contract expired by its own terms on June 30, 1951.

In June, 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid a brokerage fee of  $1\frac{1}{4}\%$  of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration (hereinafter termed GSA) and offered to renew the previous contract, and offered his services free, in view of the payment of brokerage by the member carriers. [Ex. 2.] Appellant stated in part:

“We would like at this time to have this Contract extended for any period you see fit.”

“In view of the payment of Freight Brokerage by the steamship companies we will offer our services at no charge to you.”

Mr. Salisbury of GSA replied, declining to renew the contract, but stating that the future brokerage business of GSA would be rotated among the registered Freight

Forwarders. The said letter of July 9, 1951 [Ex. 3] stated in part:

“Inasmuch as the conference carriers now pay brokerage to Freight Forwarders as designated by the shippers, there would be no purpose in effecting a further contract for the forwarding services.”

Commencing on or about July 15, 1951, on various occasions GSA requested appellant to act as its agent in performing forwarding services on appellee's shipments, and used appellant's services as a forwarding agent until August, 1953. On a number of occasions appellant demanded that GSA file with the said Conference a designation of appellant as agent of the appellee. [Exs. 4, 5, 9, 10.] GSA refused to designate appellant as agent of GSA, mainly for the reason that the conference rule required that appellant be designated as an agent who actually booked the cargo, and under the then GSA regulations, GSA booked its own shipments. [Exs. 11, 13.] Therefore GSA refused to allow appellant to book the cargo or to credit appellant with the booking.

Because of this refusal of GSA to file the designation of agency with the Conference, appellant was unable to receive brokerage fees from the carriers. If appellant would have been able to receive brokerage fees from the carriers, appellant would have received \$8,543.72 from such carriers.

Appellant submitted a claim to GSA in the sum of \$238.48 for postage expenses incurred in performing the services for GSA on the latter's shipments. This claim

was approved by GSA and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation in the sum of \$8,305.24 for alleged brokerage fees. (\$8,543.72 less the postage of \$238.48.) [Tr. pp. 30-33.] The United States rejected this claim, but conceded that appellant had performed valuable services for the United States and offered *quantum meruit* compensation, submitting \$1,881.10 in full settlement of the claim. Appellant refused the offer, claiming compensation in the amount of 1¼% of the ocean freight charge. Appellant received a check of the United States in the sum of \$1,881.10, forwarded to him in payment of the claim. Although appellant refused and continued to refuse to acknowledge such check as payment of his alleged claim, he held and continues to hold said check. [Tr. pp. 30-33.]

Appellant instituted this action to recover compensation lost by him during the period of June, 1951, to August, 1953.

### Summary of Argument.

#### I.

On the contract counts, appellee's argument is as follows:

A. Assuming for the sake of argument only that appellant and GSA entered into an agreement, whether bilateral or unilateral, that would have been binding upon GSA if executed by one who had power to bind GSA for such contracts, the dealings between appellant and GSA complained of in this action, including the letters which allegedly formed such agreement [Exs. 2, 3], were with an officer of GSA, namely, Joseph E. Salisbury who had no authority to bind GSA to any contract.



B. Whether or not Salisbury had any authority to bind GSA to a contract with appellant, there was as a matter of fact and law, no bilateral or unilateral contract between appellant and GSA.

C. Since there was no binding contract between appellant and GSA, the latter agency could not have breached any contract.

D. Since there was no contract between the appellant and GSA, the question of measure of damages for breach of contract has no significance.

## II.

On the *quantum meruit* count, appellee's argument is as follows:

A. Appellee concedes that appellant is entitled to *quantum meruit* compensation, and in this respect appellant has already received *quantum meruit* compensation from appellee in the reasonable amount of his services.

B. Reasonable value of the services was in this case found by the trial court to be in a sum equivalent to that which appellant would have received from appellee, had the same contract for services been in effect, which had expired just before the beginning of the services for which this suit is brought. Such sum constitutes the best evidence of what are the reasonable value of the services.

C. The finding of the trial court as to what constitutes the reasonable value of the services should not be disturbed by appellate court upon review.

## ARGUMENT.

### I-A.

#### Salisbury Had No Authority to Contract for GSA.

If there were any contract between appellant and GSA, such contract must be found in the terms of the exchange of letters between appellant and Joseph E. Salisbury, of GSA. [Exs. 2, 3.] There is no evidence in the record that Mr. Salisbury had any authority to bind GSA to any contract, bilateral or unilateral. In fact there is uncontroverted evidence in the record that Mr. Salisbury had no such authority. [See Ex. A, received into evidence upon stipulation of the parties, Tr. p. 19.] It will be noted that the original contract between the parties, dated June 7, 1950 [Ex. 1], was not executed by Mr. Salisbury, but by another official of GSA, in the Purchase and Stores Division who had authority to enter into such binding contracts on the part of GSA. It is a well known fact of which the court may take judicial recognition that only certain officials of the United States have power to enter into contracts. A person dealing with the United States must take notice of cognizance of the extent of the authority conferred by law upon a person acting in an official capacity. (*Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882 (1876); *United States v. Stewart*, 311 U. S. 60, 70, 61 S. Ct. 102, 85 L. Ed. 40 (1940).)

Anyone entering into an agreement with the United States must ascertain that those who purport to act for the Government stay within the bounds of their authority, even though the agents themselves may be unaware of the limitations upon their authority. (*Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 384, 92 L. Ed. 10, 68 S. Ct. 1 (1947); *Reconstruction Finance Corp. v. Martin Dennis Co.*, 195 F. 2d 698, 701-702 (C. A. 3, 1952); *Wildermuth v. United States*, 195 F. 2d 18, 24 (C. A. 7, 1952).)

The United States is not bound by acts of its officers in excess of their authority, even though it be claimed that such acts constitute estoppel. (*United States v. California*, 332 U. S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947); *United States v. San Francisco*, 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749 (1940); *State of Utah v. United States*, 284 U. S. 534, 76 L. Ed. 469, 52 S. Ct. 232 (1932); *Utah Power & Light v. United States*, 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387 (1917); *Montana Power Co. v. Federal Power Commission* (C. A. D. C., 1950), 186 F. 2d 491, cert. den. 340 U. S. 947, 95 L. Ed. 683, 71 S. Ct. 532.)

Any assurances, assuming that such were made, that appellant would be entitled to his full brokerage charges on the same basis as if he were compensated by the carriers would be outside the authority of Mr. Salisbury, and hence could not create a lawful obligation binding upon the United States.

Appellant in his opening brief at page 8 correctly states the rule that the United States is only liable upon those contracts entered into by its duly authorized officers or agents, where such officers or agents are acting within the scope of their authority on behalf of the Government. Here there is no showing that the officers or agents who allegedly made the contract were acting within the scope of their authority, in fact there is evidence that they had no such authority. [Ex. A.]

Appellant cites the case of *Smale and Robinson, Inc. v. United States* (S. D. Cal., 1954), 123 F. Supp. 457, as authority for the proposition that acts or omissions of agents lawfully authorized to bind the United States, or direct its course of conduct during a particular transaction will work estoppel against the government if agents acted within the scope of their authority. It is important to note that Judge Mathes in such case delimited such case of

estoppel to a situation in which the Government agent acted within the scope of his authority. In the case at bar, Mr. Salisbury would not have acted within the scope of his authority in creating any such contract by estoppel. Moreover, there were no facts shown as to constitute estoppel, and the trial court made no such finding as to any facts that might work estoppel against the United States, even assuming that the doctrine of estoppel were applicable against the United States.

### I-B.

#### **There Was No Unilateral or Bilateral Contract Entered Into Between Appellant and GSA.**

GSA did have authority to contract with appellant. This is evidenced by the fact that appellant did enter into a valid contract with GSA on June 28, 1950, for services rendered [Ex. 1], prior to the period of time for which appellant seeks to recover in the present action. With reference to the controversy at bar, appellant and GSA did not enter into any contract.

In the letter of July 3, 1951 [Ex. 2] appellant offered to renew the contract, and further offered his services at no charge to GSA, in view of the payment of freight brokerage by the steamship carriers. Mr. Salisbury of GSA replied [Ex. 3], and refused to enter into any new contract. The latter stated that it would be the future practice of GSA to rotate future tonnage as it became available between the registered Freight Forwarders listed with the Federal Maritime Board.

Thus, although there is an offer of a sort, there is no acceptance on the part of GSA, even assuming only for the sake of argument that Mr. Salisbury had power to bind GSA to such a contract. There was no counter-offer by GSA, since Mr. Salisbury stated what was the then

intention of GSA as to the future placing of business. There was no consideration for any contract since there was no accepted promise inuring to GSA, and no promise of any sort by GSA to appellant. Hence no bilateral contract arose.

At a later time, appellant performed certain services which were to the benefit of GSA. Admittedly those services were not purely voluntary on the part of appellant but were performed by appellant at the request of GSA. Appellant had previously informed GSA that any such services would be performed at no charge to GSA, since appellant would look to the carriers for compensation. No unilateral contract was formed, since GSA did not promise to do anything for the acts done by appellant. There was no promise by GSA in return for an act of appellant. Therefore, appellant can have no recovery on the basis of a contract with GSA.

#### I-C.

#### **There Was No Breach of Contract on the Part of GSA.**

Since there was no bilateral or unilateral contract between appellant and GSA, there could be no breach of contract of any sort by GSA. The latter agency had not promised to do anything, therefore appellant could not demand any affirmative action on the part of GSA. GSA had reserved at all times the power to book its own shipments. Therefore, appellant could not lawfully demand that GSA surrender such right.

#### I-D.

#### **There Are No Damages Arising Out of Breach of Contract.**

Since there was no contract, and no breach of contract, there are no damages payable by appellee for any alleged breach of contract.

## II-A.

### **Appellant Has Already Received Quantum Meruit Compensation From Appellee in the Reasonable Amount of Appellant's Services.**

Since appellant did perform services, which services were at the request of GSA, appellant was entitled to receive compensation from appellee on the basis of *quantum meruit*, for the reasonable value of his services. The General Accounting Office determined that appellant was entitled to *quantum meruit* recovery; that \$1,881.10 was the amount that appellant would have received from GSA under the old expired contract [Ex. 1]; and that said sum of \$1,881.10 was the reasonable value of appellant's services. [Exs. 15-18.] General Accounting Office sent to appellant its check for \$1,881.10 which appellant retained at the time of trial. [Tr. p. 28.] Therefore appellant has already received *quantum meruit* compensation from the appellee for the reasonable value of his services.

## II-B.

### **Reasonable Value of Services Is an Amount Equal to What Appellant Would Have Received if the Old Contract Had Remained in Effect.**

Since the trial court held that the reasonable value of appellant's services was in an amount equivalent to that determined by the General Accounting Office, namely, the sum of \$1,881.10, the amount that appellant would have been entitled to had he been compensated under the terms of the original expired contract, there is no need to discuss the point as to whether the United States has consented to be sued for such *quantum meruit* recovery.

Suffice it to say that the trial court determined that the reasonable value of appellant's services on a *quantum meruit* basis was equivalent to what appellant would have

earned under the old expired contract. This was the most fair basis that could be devised for determining what was the reasonable value of appellant's services. The original contract was freely negotiated by appellant and GSA under no coercion or threat of governmental action such as exercise of the war power or right of eminent domain. It is submitted that there is no fairer basis of determining what is the reasonable value than the same basis as was used by the identical parties to the transaction, for the identical services, at a time relatively close and prior to the time in question.

It is submitted that bona fide transactions made within a reasonable time before the date of valuation of the services involved in the action are the highest and best evidence of the fair and reasonable value of the services in question.

See: *United States v. New River Collieries*, 262 U. S. 341, 344, 43 S. Ct. 565, 67 L. Ed. 1014 (1923); *Olson v. United States*, 292 U. S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); *United States v. Toronto Nav. Co.*, 338 U. S. 396, 344, 70 S. Ct. 217, 94 L. Ed. 195 (1949); *United States v. Meyer*, 113 F. 2d 387 (C. A. 7, 1940), cert. den. 311 U. S. 7; *Washington Home for Incurables v. Hazen*, 70 F. 2d 847 (App. D. C., 1934); *Baetjer v. United States*, 143 F. 2d 391, 397 (C. A. 1, 1944); *Welch v. TVA*, 108 F. 2d 95, 101 (C. A. 6, 1939); *United States v. Ham*, 187 F. 2d 265, 270 (C. A. 8, 1951).

This is especially true when the previous transaction was one between the very parties to the present transaction, and involves virtually the identical subject matter.

Over the objection of the appellee, the court admitted into evidence a statement by the appellant that the reason he entered into the original contract at the lower rate was

to get on the list of government approved forwarders. [Tr. pp. 22-23.] The court did not have to accept such a self-serving statement on the part of appellant, and even if the court did accept the statement of appellant as to his subjective reason, this would play no part in the objective fact that the original contract [Ex. 1] was negotiated by the parties thereto at a given figure of compensation, with no indication that the subjective reason of appellant was communicated to or acted upon by GSA at the time of negotiating the original contract.

Aside from a possible rise in the cost of living from 1950 to 1951, there would seem to be no additional factor which should rightfully increase the fair rate of compensation for services under this claim, from 1950 to 1951-1953.

The rate paid by the carriers to brokers in the same position as appellant is not a fair comparison. The carriers stand in a different economic relationship than does the shipper in such an instance. The carrier is willing and able to pay a higher commission to the broker than does the United States as a shipper, as evidenced by the fact that appellant was willing to accept by contract a much lower rate of contractual compensation from the United States as a shipper, than he was willing to accept from the carrier.

It would not be fair to the United States as a shipper to charge it the same amount as the carriers were willing to pay out of their profits for the goods being booked with specific carriers. Let us take a familiar example to prove this economic fact. Let us suppose that we go to a travel agency as a matter of convenience and obtain steamship tickets to Europe. The travel agency charges us the same amount for the tickets as would the steamship com-



pany had we gone to the latter directly. We could have gone directly to the steamship company and paid the same price for the tickets but we prefer to deal with the travel agency because of the little additional services the latter provides to us. The travel agency receives nothing from us, but obtains its profits from the discount or commission it receives from the steamship company, let us assume 10% of the ticket price. Let us further assume that the travel agency changes its policy and now seeks to charge us 10% of the ticket price for the various services it performs for us. We would refuse to use the services of the travel agency, as it would be far more economical for us to buy our tickets directly from the steamship company. In such an example, the steamship company is willing and able to pay to the travel agency 10%, but the traveler is neither willing nor able to pay the 10% for such services. Here is an instance where the reasonable value of the services differs depending upon the economic relationship which the parties bear to each other.

Appellant did not perform all of the services for GSA as he would have performed for a private shipper, in that the GSA reserved the right and did select the carrier. [Tr. p. 32.]

## II-C.

### **The Finding of the Trial Court as to the Reasonable Value of Appellant's Services Should Not Be Disturbed on Appeal.**

The trial court had before it two opposing contentions as to reasonable value of services. The first was that of plaintiff, namely, the sum of \$8,543.72, which appellant testified he would have received had he been paid the 1¼% figure by the carriers. The second contention was that of appellee that the sum of \$1,881.10 is the fair and

reasonable value of services, since that is the amount that appellant would have received from GSA if the old contract had been in force. There was no other evidence of any sort as to what might constitute the reasonable value of appellant's services. It is submitted that the trial court rightfully selected that evidence contended for by appellee. Since the trial court made a finding to that effect based upon controverted evidence, it is respectfully submitted that such a factual determination by the trial court should not be disturbed upon appeal.

**Conclusion.**

The judgment below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,  
*United State Attorney,*

RICHARD A. LAVINE,  
*Assistant U. S. Attorney,*  
*Chief of Civil Division,*  
*Attorneys for Appellee.*

No. 15411

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S PETITION FOR A REHEARING.

---

THOMAS J. GATELY,

112 West Seventh Street,  
San Pedro, California,

*Attorney for Appellant.*

FILE

AUG 23 1957

PAUL P. O'NEILL, C



## TOPICAL INDEX

	PAGE
Summary statement of grounds upon which a rehearing is requested .....	2
Conclusion .....	6

---

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Atlantic & Gulf West Coast, etc. v. United States, 94 Fed. Supp. 138 .....	4
Federal Crop Insurance v. Merrill, 332 U. S. 380.....	3
Gray v. Chetham, 52 S. W. 2d 762.....	5
Pacific Westbound Conference, et al. v. United States, 94 Fed. Supp. 649 .....	4
Smale & Robinson, Inc. v. United States, 123 Fed. Supp. 457....	3
United States v. Minnesota Mutual Invest. Co., 271 U. S. 212....	2
3 U. S. M. C., Docket No. 657.....	4

### STATUTES

28 U. S. C., Sec. 1346(a)(2).....	2
-----------------------------------	---

### CONGRESSIONAL REPORTS

House of Representatives, Union Calendar No. 2939, p. 32.....	4
Report of Investigation of the Use of Private Freight Forwarders, March 1955, Exhibit 21, Sheet 7.....	6

### OTHER AUTHORITIES

54 Am. Jur. 576, Sec. 66.....	2
-------------------------------	---



No. 15411

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

JOHN J. MOYLAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S PETITION FOR A REHEARING.

---

*To the United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Circuit Judges, Chambers and Barnes, and District Judge, James J. Walsh:*

John J. Moylan, appellant in the above described appeal, respectfully petitions the court for a rehearing after decision rendered August 8, 1957.

The original hearing in this matter was had on June 7, 1957, with decision as above.

## Summary Statement of Grounds Upon Which a Rehearing Is Requested.

### I.

In his opinion Judge Chambers stated that any possible defect as to the lack of consent of the government to be sued in the case herein, should be disclosed even now.

Appellant, anticipating the possibility of a review of this decision by the Supreme Court of the United States, respectfully requests this Honorable Court to rule on that point. Appellant instituted this action in the District Court on the theory of an express contract and also on the theory of a contract implied in fact, for which he asked reasonable compensation for his services. HAS THE U. S. GOVERNMENT CONSENTED TO BE SUED IN THE CASE HEREIN?

Appellant respectfully submits that the government has consented to be sued.

28 U. S. C., Sec. 1346(a)(2);

*United States v. Minnesota Mutual Invest. Co.*, 271  
U. S. 212;

54 Am. Jur. 576, Sec. 66.

### II.

Appellant at page 8 of his brief made the following statement:

“It is illogical to contend that in the same transaction an officer has authority to bind appellee to pay the carrier and the expenses of the forwarding agent, but has no authority to bind appellee for compensation of the forwarding agent in handling the shipments.”

Appellant respectfully submits that this Honorable Court erred in failing to rule on the authority of Mr.



Salisbury to employ appellant as a freight forwarder. Appellant urges that it is mandatory to make such a ruling for if Mr. Salisbury committed an unauthorized act in using appellant's services, the payment of appellant's expenses by appellee constituted an unlawful disbursement of public funds.

### III.

Appellant respectfully submits that there was a unilateral contract formed between appellant and appellee. In the event Mr. Salisbury acted without authority, appellee's acceptance of the benefits of appellant's performance and the payment of appellant's expenses, ratified the acts of Mr. Salisbury in using the services of appellant as a forwarding agent.

### IV.

Appellant respectfully submits that this court erred in failing to discuss the case of *Smale and Robinson, Inc. v. United States* (1954), 123 Fed. Supp. 457. If Mr. Salisbury had authority to employ appellant as a forwarding agent he was *lawfully authorized to direct the course of conduct of the United States during a particular transaction*. This authority will work estoppel against the appellee. Appellant submits that the sole citation in the opinion (*Federal Crop Insurance v. Merrill*, 332 U. S. 380) is inapposite to the case herein. Appellant concedes that he risked the extent of Mr. Salisbury's authority in dealing with the government. However, at the trial appellee produced no evidence that there is a published rule or regulation prohibiting Mr. Salisbury from using the services of private freight forwarders, nor did appellee introduce any evidence whatsoever showing the lack of authority by Mr. Salisbury to use appellant's services. Appellant re-

spectfully poses the following question: WHERE IN THE INSTANT CASE IS THERE TOO MUCH OF 332 U. S. 380, TO PRECLUDE A RECOVERY IN THE CASE HEREIN?

V.

Appellant respectfully submits that this court erred in finding that the trial court was given no proof that during the period involved there was a uniform rate paid by the shippers. It is a matter of common knowledge that the brokerage fee of a forwarder is included in the rate charges by a carrier. Testifying before a Congressional Committee investigating the activities of foreign freight forwarders, Arthur G. Wildberger, freight traffic officer for General Services Administration stated: "Carriers have figured brokerage in their rates and in my opinion, would never reduce them." (House of Representatives, Union Calendar No. 2939, p. 32.)

The payment of brokerage by the Conference starting 1951, was not voluntary, but was the result of an order of the Maritime Commission (3 U.S.M.C., Docket No. 657) which compelled steamship companies on the Pacific Coast to remove prohibitions against payment of brokerage to forwarders on Pacific Coast shipments. This order of the Maritime Commission was upheld by the Federal Courts in the following cases:

*Atlantic & Gulf West Coast, etc. v. United States*,  
94 Fed. Supp. 138;

*Pacific Westbound Conference, et al. v. United States*, 94 Fed. Supp. 649.

Although the carrier paid the brokerage to the forwarder from freight charges received by the carrier, it was the shipper who paid the uniform rate of  $1\frac{1}{4}\%$  of the ocean freight charge whenever he used the services of a carrier.

## VI.

At page 2 of the decision herein Judge Chambers stated:

“The pattern of the Pacific Conference just did not mesh with the government’s plan of doing business and it took three years to remodel the Pacific Conference’s and the government’s contract machinery.”

During this period all the conference required was the certification by the shipper that the forwarder was acting as the shipper’s forwarder. The Rules of the Conference have not been changed as the certification is still required. It did take the government three years to add the word “tentative” to its bookings. This ponderous, bureaucratic action by appellee should provoke on honorable men justifiable criticism.

## VII.

Appellant respectfully submits that this court erred in failing to determine the reasonable value of appellant’s services pursuant to established rules of law. Judge Chambers in his decision states: “Here there was a justifiable reason for the trial court to reject the higher figure.” In *quantum meruit* recovery, claimant is entitled to reasonable compensation for his services. The majority, and only rule of law pertaining to the determination of reasonable compensation is:

“Reasonable value of services rendered would be what was the reasonable price paid for such service or like services in the community where such services or like services were rendered.” (*Gray v. Chatham*, 52 S. W. 2d 762, 763.)

Appellant respectfully submits that if there was a justifiable reason for the trial court to reject the higher figure, it should have also rejected the lowest figure available, and determined the reasonable value of appellant’s services on

the basis of cost to industry for similar services. Mr. Salisbury in a letter to the Office of the Comptroller, *in re*, The Moylan case, stated:

“It is therefore our opinion that such value is more equitably established by a comparison with the cost of such services performed for industry, rather than the lowest contract figures which the Government may over a period of years obtain thru the medium of competitive bidding.” [Report of Investigation of the Use of Private Freight Forwarders, March, 1955, Exhibit No. 21, Sheet 7.]

### Conclusion.

Appellant respectfully submits that appellant herein rendered valuable service to the government at its request, the benefits of said services having been accepted by the government. Whether the liability of the government be founded on an express contract or *quantum meruit*, appellant is entitled to the reasonable value of his services and such value should be determined by this Honorable Court pursuant to established principles of law. It is the duty of a reviewing court to hand down definitive answers to all questions presented for review. Generalities in an opinion do not serve to establish precedents or affirm recognized rules of law.

Only a granting of a rehearing and the reversal of the decision of August 8, 1957, can undo the injustice done appellant.

Dated at Los Angeles this 22nd day of August, 1957.

THOMAS J. GATELY,

*Attorney for Appellant.*

**Certificate of Counsel.**

I hereby certify that I am counsel for the appellant in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law and in fact, as well, and that said petition is presented in good faith and is not interposed for delay.

Dated at Los Angeles this 22nd day of August, 1957.

THOMAS J. GATELY,

*Attorney for Appellant.*



